87-1356

No. .....

In The

Supreme Court of the United States

October Term, 1987

—o—

MATTER OF THE GUARDIANSHIP OF PEARL C. POSEY, ADULT INCOMPETENT, RAYMOND HARKRIDER, RAYMOND HARKRIDER AS EXECUTOR OF THE ESTATE OF GEORGIA CORY, DECEASED, BETTY ROGERS and JUNE NELSON,

Petitioners,

v.

LAFAYETTE BANK AND TRUST COMPANY, HANNA GERDE & MEADE, BALL EGGLESTON BUMBLEBURG & McBRIDE, FLOYD WILCOX, STUART & BRANIGIN, ANN G. DAVIS and VAUGHAN VAUGHAN & LAYDEN,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

—o—

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QUESTIONS PRESENTED FOR REVIEW

1. When a state appellate rule fails to provide for any sort of notice, hearing or procedural due process prior to imposing liability for attorney fees against a losing party, and allows the award of such fees based solely upon the discretion of the court, and liability under such a rule is imposed upon a finding of "bad faith" without opportunity for challenge or hearing on the record, has the party found liable been denied due process of law contrary to U. S. Const. Amend. XIV, § 1?

2. When, despite the existence of express statutory procedure specifically delineating and granting both procedural and substantive rights to parties in guardianship proceedings, a court consistently, throughout a protracted series of proceedings, ignores statutorily mandated requirements for the selection of a guardian, and deprives petitioners of meaningful opportunities to respond or present argument, and, based upon a record compiled in such a fashion thereby rules adversely to petitioners claiming against a guardian who conveyed his ward's farm to himself, have petitioners been deprived of property contrary to U. S. Const. Amend. XIV, § 1?

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OPINIONS BELOW

The originally unpublished opinion of the Indiana Court of Appeals, First District, was filed September 3, 1986, and is attached as Appendix A. Said opinion was later ordered published and may be found at 513 N.E.2d 674.

The unpublished order of the Indiana Court of Appeals, First District, denying rehearing, was filed October 14, 1986, and is attached as Appendix C.

The opinion of the Indiana Supreme Court granting the Civil Petition to Transfer was filed August 25, 1987, is published at 512 N.E.2d 155, and is included as Appendix E.

The unpublished order of the Indiana Supreme Court denying rehearing was filed November 9, 1987, and is attached as Appendix G.

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GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion of the Indiana Supreme Court was filed August 25, 1987. The Indiana Supreme Court denied a petition for rehearing upon that opinion on November 9, 1987. This petition was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C., § 101.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, § 1:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law; . . .

Indiana Rule of Appellate Procedure 15(G):

> *Damages Against Appellant.* If the court on appeal affirms the judgment, damages may be assessed in favor of the appellee not exceeding ten percent (10%)

upon the judgment in money judgments, and in other cases in the discretion of the court; and the court shall remand such cause for execution.

I. C. 29-1-1-12 (1961):

"*Service of Notice. Sec. 12.* Unless waived and except as otherwise provided by law, all notices required by this code to be served upon any persons shall be served as the court shall direct by rule or in a particular case, either:

(a) By delivering a copy of the same to such person or by leaving a copy of the same at his last and usual place of residence, at least ten (10) days before the hearing, if he is a resident of the State of Indiana. . . ."

I. C. 29-1-18-10 (1973):

"I.C. 29-1-18-10. *Appointment of Guardian; Suitable Persons; Requests.*

Sec. 10. (a) The court shall appoint as guardian or co-guardian of an incompetent the person, persons, or corporate fiduciary or any combination thereof most suitable and willing to serve, having due regard to:

1) any request made by one for whom a guardian is being appointed by reason of old age, infirmity or other incapacity, other than insanity, mental illness, mental retardation, senility, habitual drunkenness, or excess use of drugs;

2) any request for the appointment contained in a will or other written instrument;

3) any request made by a minor of the age of fourteen (14) years or over the appointment of his guardian;

4) any request for the appointment made by the spouse of an incompetent;

5) the relationship by blood or marriage to the person for whom guardianship is sought;

6) the assets or interest of the incompetent and the incompetent's estate."

I. C. 29-1-18-11 (1953):

"I.C. 29-1-18-11. *Petition for Appointment.*

Sec. 11. Any person may file a petition for the appointment of himself or some other qualified person as guardian of an incompetent. Such petition shall state:

(a) The name, age, residence, and post office address of the incompetent;

(b) The nature of his incapacity in accordance with the classification set forth in Section 1901(c) hereof;

(c) The approximate value and description of his property, including any compensation, pension, insurance or allowance to which he may be entitled;

(d) Whether there is, in any state, a guardian for the person or estate of the incompetent;

(e) The residence and post office address of the person whom petitioner asks to be appointed guardian:

(f) The names and addresses, so far as known or can reasonably be ascertained, or the persons most closely related by blood or marriage to the incompetent;

(g) The name and address of the person or institution having the care and custody of the incompetent;

(h) The name and addresses of persons for which any natural person whose appointment is sought is already guardian;

(i) The reason why an appointment of a guardian is sought and the interest of the petitioner and the appointment.

(j) The name and business address of the attorney who is to represent the guardian." (Emphasis supplied.)

I. C. 29-1-18-16 (1953):

29-1-18-16. *Orders of court; notice of hearing*

Sec. 16. Before the court enters an order upon any petition, pleading, or other paper filed with the court in the matter of the guardianship of the estate or of the person, notice of hearing thereon shall be given to the guardian of the estate unless he shall have signed the same, consented thereto, or waived notice of hearing thereon.

I. C. 29-1-18-17 (1953):

29-1-18-17 *Request for notice of hearing*

Sec. 17. At any time after the issuance of letters of guardianship,

(a) The guardian of the person;

(b) Any department, bureau or agency of the United States or of this state or any political subdivision thereof which makes or awards compensation, pension, insurance or other allowance for the benefit of the ward's estate, or

(c) Any department, bureau or agency of this state or any political subdivision thereof or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent, or

(d) Any other interested person may, in person or by attorney, serve upon the guardian or upon his attorney, and file with the clerk of the court where the proceedings are pending, with a written admission or proof of service, a written request stating that he desires written notice of the filing of and hearings on petitions, reports, pleadings, or other papers in

connection with the settlement of accounts, the sale, mortgage, lease or exchange of any property of the estate, allowances of any nature payable from the ward's estate, the investment of funds of the estate, the removal, suspension, or discharge of the guardian or final termination of the guardianship, or any other matter as specified in such request. The applicant for such notice must include in his written request his post office address or that of his attorney. Unless the court otherwise directs, upon filing the request, the person shall be entitled to notice of all such hearings or of such of them as he designates in his request. The court may, in its discretion, determine that any person requesting notice pursuant to (d) hereof has no interest therein, either generally or with respect to a particular matter, and is not entitled to the notice requested.

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STATEMENT OF THE CASE

Petitioners are the next of kin and sole beneficiaries of the estate of Pearl Posey (hereinafter "Petitioners" or "Pearl's Family"). Respondents, Lafayette Bank and Trust Company (hereinafter "Lafayette Bank") and Floyd Wilcox (hereinafter "Wilcox"), have acted as guardian of Pearl's estate and guardian of Pearl's person, respectively. Respondent, Hanna Gerde & Meade, has acted as attorney for Lafayette Bank in Pearl's guardianship proceeding. The Respondent, Stuart & Branigin, has acted as attorney for Wilcox in Pearl's guardianship proceeding. The Respondent, Ann G. Davis, an associate of the law firm of Vaughan, Vaughan & Layden, acted as Pearl's court appointed attorney in Pearl's guardianship

proceeding. Respondent, Ball Eggleston Bumbleburg & McBride, acted as the attorney for the Petitioner and Purdue National Bank at the outset of Pearl's guardianship proceeding.

Pearl was born in 1896, and at the time of her death on March 19, 1982, was approximately 86 years old. Upon the death of Pearl's husband, George Posey, in 1966, Pearl became the owner of an eighty (80) acre farm, a forty (40) acre farm, the couples' residence and certain joint cash and savings accounts. Shortly after George Posey's death, Wilcox purchased Pearl's forty (40) acre farm for approximately Thirty Thousand Dollars ($30,000.00). On October 4, 1973, at the age of seventy-seven (77), Pearl executed a general power of attorney appointing Wilcox her attorney-in-fact. In 1980, pursuant to the general power of attorney, Wilcox sold Pearl's residence for Twenty-Eight Thousand Dollars ($28,000.00).

On November 9, 1977, Pearl and Wilcox executed a document styled an "Escrow Agreement," prepared by Wilcox's attorney, pursuant to which a deed to Pearl's eighty (80) acre farm was placed in escrow until Pearl's death. Under the terms of the "Escrow Agreement," the deed would be transferred to Wilcox, free and clear and without consideration, upon Pearl's death. On April 28, 1979, Pearl suffered a stroke, after which she became a permanent patient at the Americana Nursing Home in Lafayette, Indiana. On March 22, 1982, three (3) days after Pearl's death, the deed granting Pearl's eighty (80) acre farm to Wilcox was recorded in the Office of the Recorder of Tippecanoe County, Indiana.

On March 18, 1981, Pearl suffered a second massive stroke, which rendered her comatose. On June 30, 1981,

the Petitioners filed a Petition for Appointment of a Guardian of Pearl's Person and Estate in strict compliance with I. C. 29-1-18-11. In their petition, Pearl's Family requested that Pearl's brother, Raymond Harkrider, and Pearl's bank, the Purdue National Bank, be appointed co-guardians of Pearl's estate. The Petition further requested that, in the event the court deemed it necessary, Pearl's niece, June Nelson, be appointed guardian of Pearl's person. A hearing on the Petition was set by the Tippecanoe Circuit Court for July 24, 1981.

On July 21, 1981, three (3) days prior to the hearing on Pearl's Family's Petition, Wilcox filed a "cross-petition" for the appointment of a guardian of Pearl's person and estate. In his "cross-petition," Wilcox requested that he be appointed guardian of Pearl's person, and that he and an unspecified local bank be appointed guardian of Pearl's estate. The Indiana Code does not provide for the filing of a "cross-petition" for the appointment of a guardian. If considered a petition under I. C. 29-1-18-11 it was deficient in that: (1) the Code does specifically require that all proposed guardians be disclosed in the petition and; (2) the Code requires that ten (10) days notice be given. I. C. 29-1-1-12.

On July 24, 1981, the trial court conducted a hearing on Pearl's Family's Petition and the Respondents' "cross-petition," and on July 27, 1981, entered an order appointing Lafayette Bank guardian of Pearl's estate. During the July 24, 1981 hearing the court stated on the record that Wilcox's past dealings with Pearl made his appoint-

ment as her guardian "untenable."[1] Despite that finding, the trial court on September 9, 1981 appointed Wilcox guardian of Pearl's person. In that same order the court referred to an *ex parte* and extrajudicial "report" received from the Respondent, Ann G. Davis, (*R.*, at 34). Pearl's Family was given no notice of such "report," and had no opportunity to respond to the contents thereof.

On November 6, 1981 Pearl's Family filed its request for notice of hearings. Pursuant to I. C. 29-1-18-17 they were therefore entitled to notice of all hearings. Despite that statutory requirement, the following orders were initially approved by the trial court without notice to Pearl's Family and without first conducting a hearing on the propriety of the claims asserted therein as required by I. C. 29-1-18-16:

11- 9-81	Fee-expense award to Davis	$ 1,205.10
3- 5-82	Fee-expense award to Davis	$ 655.00
3-31-82	Fee-expense award to Wilcox as guardian of person	$ 2,388.75
7-20-82	Fee-expense award to Wilcox as executor (probate estate)	$ 5,000.00
11-10-82	Fee-expense award to Davis	$ 350.00

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1 ". . . From a legal standpoint, however, it would be unfair to all concerned to appoint him [Wilcox] Guardian. He would then be put in the position of being called upon to review his past dealings with her, and approve them, or disapprove them. I can't imagine as Guardian challenging his acts in farming her land, accounting to her, procuring the power of attorney, acting under it, acting with regard to the preparation of the Will in 1980. This would put him in an untenable position. . . ."

(*R.*, at 380).

3-11-83	Fee-expense award to Wilcox as executor (probate)	$19,939.57
12- 3-84	Hanna Gerde & Meade for bank as guardian of estate	$ 1,035.00

The following awards were made after hearing, but no notice prior to hearing was ever given:

12- 3-84	Ball Eggleston Bumbleburg & McBride	$ 200.00
3- 4-85	Fee-expense award to Wilcox as guardian of person	$ 2,382.16
3- 4-85	Hanna Gerde & Meade (total of two awards)	$ 2,125.00

The foregoing are indicative of the manner in which due process requirements were consistently ignored by the trial court. In 1983, Pearl's Family initiated an appeal (hereinafter the "first appeal") to the Indiana Court of Appeals, in which Pearl's Family requested review of the first five of the orders, as well as the trial court's appointment of Pearl's guardians pursuant to Wilcox's "cross-petition." In a memorandum decision filed by the Indiana Court of Appeals on July 20, 1983, the court held that the propriety of the appointment of Pearl's guardians was moot due to Pearl's subsequent death, and that the propriety of the above fee-expense orders could not receive appellate review until a final accounting of the guardians had been approved by the trial court.

Following that initial appellate determination, on March 11, 1985 the trial court entered its "Order Approving Supplemental Report of Distribution and Discharging Guardian." A hearing was held prior to the entry of this order, but over the objection of Pearl's Family

the trial court ratified the earlier *ex parte* orders. Pearl's Family then initiated the present appeal to the Indiana Court of Appeals. One of the key errors alleged in this appeal was the failure of the trial court to *ever* grant Pearl's Family meaningful opportunity to challenge the orders entered previous to the first appeal (listed *supra*). On September 10, 1985, Pearl's Family filed with the Indiana Court of Appeals a petition requesting that the record of proceedings in the first appeal be considered a part of the record of proceedings in the present appeal (Appendix H), which was granted by order of the Indiana Court of Appeals on September 26, 1985, (Appendix I).

In their appellees' briefs, the Respondents requested that the Indiana Court of Appeals, pursuant to the Indiana Rule of Appellate Procedure, 15(G), assess damages against Pearl's Family for prosecuting a bad faith appeal. Pearl's Family responded briefly to this request for sanctions in their Reply Brief.

On September 3, 1986 the Indiana Court of Appeals filed its Memorandum Decision affirming the trial court's approval of the guardian's final accounting. Without giving Pearl's Family notice or an opportunity to be heard, the court found Pearl's Family guilty of bad faith for the prosecution of the present appeal and pursuant to A.R. 15(G), imposed liability for fees. Among the reasons stated by the court of appeals for its decision was "the absence of a mention of the previous appeal." (Appendix A at 7). Pearl's Family's Petition for Rehearing in the Indiana Court of Appeals was overruled on October 14, 1986. (Appendix C).

On November 3, 1986 Pearl's Family filed their Petition to Transfer (Appendix D) and Brief in Support of Petition to Transfer in the Supreme Court of Indiana which was granted by the supreme court by its opinion filed August 25, 1987, (Appendix E). In its opinion on transfer, the Supreme Court of Indiana summarily affirmed the opinion of the Indiana Court of Appeals on all issues except that involving the imposition of sanctions pursuant to A.R. 15(G).

In its opinion on transfer, the Supreme Court of Indiana affirmed the court of appeals' finding of liability under A.R. 15(G) based partially on a renewed allegation that Pearl's Family failed to disclose the first appeal. (Appendix E at 28). On September 14, 1987 Pearl's Family filed their Petition for Rehearing in the Supreme Court of Indiana (Appendix F), which was overruled on November 9, 1987, (Appendix G). At no time in these proceedings was Pearl's Family notified, by the Indiana Court of Appeals or the Supreme Court of Indiana, that either court was considering finding Pearl's Family in bad faith for filing the present appeal and holding them liable, under A.R. 15(G), for fees. Similarly, Pearl's Family was never given a hearing on the record as to the question of bad faith in the prosecution of the present appeal.

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REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. Indiana Rule of Appellate Procedure 15(G) allows the imposition of attorney fees upon a losing party based solely upon the discretion of the appellate tribunal and without opportunity for hearing or meaningful response. The rule thereby violates the due process guarantees of U.S. Const. Amend XIV, § 1.

As fully set forth *supra*, Indiana Rule of Appellate Procedure (hereinafter "A.R.") 15(G) allows either the Indiana Court of Appeals or the Supreme Court of Indiana to assess attorney fees against the losing party in an appeal based solely upon the court's discretion. Although in cases with "money judgments" the fees awarded under A.R. 15(G) may not exceed ten percent (10%) of the judgment amount, in all other cases the courts have unfettered discretion to impose fees in any amount. On the one hand it could be contended that this case involves the propriety of the approval of the guardian's accounting and therefore the fees are not subject to the ten percent (10%) limitation. On the other hand, if the controversy is the amount of the fee/expense awards, the ten percent (10%) limitation would apply. The Indiana Supreme Court opinion provides no guidance as to that point.

It is particularly significant that A.R. 15(G) allows the appellate tribunal to unilaterally impose a fee award and remand the award for execution proceedings only. The liability of the losing party is thus established without any evidentiary hearing and the rule only allows the party assessed fees a "hearing" for proceeding supplemental.

The constitutional shortcomings of A.R. 15(G) are especially apparent in this case in light of uncontroverted error on the face of both the court of appeals and Indiana

supreme court opinions. The supreme court includes, as one of the reasons to impose fee liability, petitioner's "failure to disclose his previous appeal raising many of the same issues" (Appendix E at 28), yet Appendix I is the order of the court of appeals granting petitioners' own motion to consider the record from the first appeal as part of this case. Presumably a hearing on fee liability or the opportunity for a meaningful response would allow the appellate courts an opportunity to avoid such blatantly erroneous factual findings.

In addressing the assessment of sanctions, this Court has held that U.S. Const. Amend. XIV, § 1 requires that a person subjected to any sanction be given "fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 65 L.Ed. 2d 488, 501-02, 100 S.Ct. 2455 (1980); *Societe Internationale v. Rogers*, 357 U.S. 197, 2 L.Ed.2d 1255, 78 S.Ct. 1087 (1958). Prior to the imposition of fee liability by the court of appeals, there was no opportunity to respond to the bases it ultimately used. After the liability was imposed, the *only* opportunities for response to the court's imposition of fee liability were the following: The petition for rehearing in the Indiana Court of Appeals (which was denied without opinion, Appendix B); the petition for transfer to the supreme court (Appendix D), which was granted, but by an opinion perpetuating the erroneous finding that the petitioners failed to mention the first appeal (Appendix E) and; the petition for rehearing in the Indiana supreme court which was also summarily denied (Appendix G). None of those petitions provided an opportunity for hearing on the record, and moreover came after the burden of proof was shifted to Pearl's Family.

The constitutional necessity of a hearing on the record in this case is further emphasized because, as previously noted, "bad faith" was a key predicate for the imposition of fees. The court of appeals made that finding (Appendix A at 7), which was ratified by the Indiana supreme court (Appendix E at 28).

Textor v. Board of Regents of Northern Illinois University, 711 F.2d 1387 (7th Cir. 1983) held that *Roadway Express, supra, mandates* a hearing on the record when bad faith forms a basis for the award of fees. *See also, Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 206 (7th Cir. 1985) ("the trial court has not based the sanctions on bad faith, which would require a hearing. . . .") By finding "[g]ross abuse of the right to appellate review" (Appendix E at 28) and basing fee liability upon that finding, without a hearing, the Indiana supreme court has denied petitioners' procedural due process rights. That such a denial occurred without violating the terms of A.R. 15(G) indicates the rule itself is constitutionally insufficient.

The Tenth Circuit has recently addressed the need for observance of due process in assessing sanctions. In *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987), the court held that basic due process requires that one be given notice that fee sanctions are being considered by the court and a subsequent opportunity to respond. *Id.* at 1514. Given that it is patently obvious that both the court of appeals and the supreme court misread the record, one of the observations of *Braley* is acutely significant here:

> In one sense notice may seem superfluous when an appellate court has determined, after considering briefs, argument and the record that the appeal is so un-

> meritorious as to be frivolous. The court's determination is a judgment on the state of the law as applied to the facts in the record. The only possible rebuttal to the court's conclusion would be a demonstration that the court overlooked controlling statute or case law or *misread the record.* A petition for rehearing would *seem* adequate to bring such errors to the court's attention.

Id. at 1514 (emphasis added).

A.R. 15(G) requires no hearing and the courts held none. Notwithstanding the petitions for rehearing and transfer placed before them, the Indiana appellate courts repeatedly misread the record and used the erroneous allegation that petitioners failed to apprise the court of the first appeal as one of the key bases for finding bad faith. In *Braley* the Tenth Circuit reversed the grant of sanctions against an attorney because he was not given a *de novo* opportunity to argue the original three-judge panel's imposition of sanctions. In this case, Pearl's Family was given no notice of what the court of appeals would consider "bad faith" in assessing sanctions, or whether in fact "bad faith" is encompassed under A.R. 15(G). By the time the court enunciated the standard for imposing liability, the burden had shifted to Pearl's Family to show the error in the court of appeals decision and they, like the attorney in *Braley,* were denied a *de novo* review of the finding of bad faith. However, unlike the attorney in *Braley,* the sanctions levied against petitioners were affirmed. The Indiana supreme court conceded that the standard was unknown prior to this opinion when it stated: "In order to provide guidance to the bench and bar as to circumstances when such fees are appropriate, we

grant transfer herein solely for the purpose of addressing the A.R. 15(G) issue." (Appendix E at 27). Under color of A.R. 15(G) petitioners were deprived of due process. See also *Armstrong v. Manzo*, 380 U.S. 545, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965) (unconstitutional deprivation of due process to improperly shift burden of proof).

Based upon the foregoing, Petitioners respectfully request that certiorari issue to the Supreme Court of Indiana. Given the increasing litigation on the subject of attorney fees as sanctions nationally (see, e.g. *Braley, supra*) and in Indiana (see, e.g. *Orr v. Turco Manufacturing Co., Inc.*, (Ind. App.) 496 N.E.2d 115 (1986); *First National Bank of Danville v. Reynolds*, (Ind. App.) 491 N.E. 2d 218 (1986); *Baker v. Kinnett*, (Ind. App.) 488 N.E.2d 1128 (1986); *Briggs v. Clinton County Bank & Trust Co.*, (Ind. App.) 452 N.E.2d 989 (1983)) review of this case and this state provision provides an opportunity for the issuance of guidance to state courts with similar provisions, and therefore similar problems, in disciplining litigants while maintaining constitutional due process guarantees.

II. The conduct of the proceedings by the trial court consistently denied petitioners' rights to procedural due process and thereby resulted in an unconstitutional deprivation of property.

As detailed in the "Statement of the Case," *supra*, the trial court consistently, over a considerable period of time, engaged in a course of conduct detrimental to the due process rights of petitioners. Orders were entered without notice or hearing to Pearl's Family despite their statutory entitlement under I. C. 29-1-18-17. The Indiana statute mandating preferences in the selection of guardians was ignored, I. C. 29-1-18-10. The notice provisions pertaining

to petitions for guardianship were ignored by allowing the filing of a "cross petition" which did not specify the guardian whose appointment was sought, I. C. 29-1-18-11 (e). Insufficient notice of the "cross-petition" was ignored, I. C. 29-1-1-12. The trial court appointed as guardian an individual it previously stated was incompetent to serve. At the hearing on the final accounting following the first appeal the trial court, over Pearl's Family's objections, did not attempt to cure its failure to give notice prior to entering the earlier orders and simply ratified those earlier, *ex parte*, entries.

The Petitioners were thus before the Indiana Court of Appeals in the posture of appellants. That posture was unconstitutionally forced upon them by the conduct of the previous proceedings in the trial court. As such, they were required to show the trial court abused its discretion in ruling as it did (Appendix A at 6). At *no point* in this litigation have petitioners ever been heard *de novo* with respect to the entries made without notice to them.

This Court recognizes that it is wrong to deprive any individual of property without giving notice and an opportunity for hearing appropriate to the nature of the case. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950). The debate often focuses upon the particular form of notice given in a case, but as to the basic requirement that some form of notice be given "there can be no doubt." *Armstrong, supra*, at 380 U.S. 551.

Here, the procedural and substantive prejudice of the *ex parte* orders was compounded by the trial court's failure to follow the law set forth in the Indiana statutes governing the selection of guardians. When Wilcox was

appointed, the trial court contradicted both the law and its own prior observation that Wilcox was unable to serve as guardian as a matter of law. The entry of the orders without notice, plus the wholesale abandonment of the substantive law, prejudiced petitioners.[2] That conduct arose to constitutional magnitude because it persisted for such a period of time and involved so many factors in this case, great and small. Taken together, the trial court's actions coalesce to compel the conclusion that the procedural due process rights of petitioners were violated.

The Indiana appellate process did nothing to cure the injury suffered at the trial court level. As previously noted, petitioners were forced into the posture of appellants, and thus bore the burden of showing the error of the trial court orders and actions. This Court has held "it is plain that where the burden of proof lies may be decisive to the outcome." *Armstrong, supra*, at 551, citing *Speiser v. Randall*, 357 U.S. 513, 525, 2 L.Ed. 2d 1460, 1472, 78 S.Ct. 1332 (1958). Only a hearing *de novo* on the matters ruled upon by the trial court *ex parte* could cure the unconstitutional shifting of the burden to petitioners.

Given that the result of the trial court proceedings was to deprive petitioners of the portions of Pearl's estate distributed by means of the *ex parte* orders, it is clear a true deprivation of property occurred. The injury here is substantial. Constitutional due process imperatives are intended to guard against such obvious injustice as oc-

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[2] Because guardianship is not part of the common law Indiana requires strict compliance with the statute. *State ex rel Shrenker v. Superior Court of Madison County*, 242 Ind. 171, 177 N.E.2d 594 (1961).

curred here. Petitioners, therefore, respectfully request that certiorari issue to the Supreme Court of Indiana.

CONCLUSION

Based upon the above two grounds Petitioners respectfully request that a writ of certiorari issue to the Supreme Court of Indiana.

Respectfully submitted,

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APPENDIX A

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IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

IN THE MATTER OF THE GUARDIANSHIP OF PEARL C. POSEY, adult incompetent.	)	
RAYMOND HARKRIDER, GEORGIA CORY, BETTY ROGERS and JUNE NELSON,	)	NO. 1-685 A 146
Appellants,	)	(Filed September 3, 1986)
—v—	)	

LAFAYETTE BANK AND TRUST COMPANY, HANNA, GERDE & MEADE, BALL, EGGLESTON, BUMBLEBURG & McBRIDE, FLOYD WILCOX, STUART & BRANIGIN, ANN G. DAVIS and VAUGHAN, VAUGHAN & LAYDEN,

Appellees.

APPEAL FROM THE FOUNTAIN CIRCUIT COURT
The Honorable Vincent F. Grogg, Judge
(On change of venue from Tippecanoe Circuit Court)
CAUSE NO. 84-C-215

MEMORANDUM

ROBERTSON, P. J.

This is an appeal from a guardianship proceeding wherein the trial court terminated the guardianship of the deceased Pearl Posey. The appellant Raymond Harkrider (Harkrider), Pearl's brother, basically challenges all events and orders arising from her guardianship. Appellee Floyd Wilcox (Wilcox) was the guardian of her person and appellee Lafayette Bank & Trust (Bank) was the guardian of the estate.

A narrative of the facts shows that Mr. and Mrs. Floyd Wilcox became neighbors of the Poseys in 1949. Thereafter, both couples became friends by frequently visiting, socializing at least once a week, and sharing expenses and incomes in two farming operations.

Upon her husband's death in 1966, Pearl moved to Stockwell, Indiana. The Wilcoxes visited her there week-

ly, acted as her attorney-in-fact when asked by Pearl in 1973, and managed her affairs while Pearl underwent surgeries in 1977 and 1978.

After Pearl's first stroke in April 1979, Wilcox continued to assist her by exercising a power of attorney, prepared at the direction of Pearl, who was bedridden but mentally competent. The month after her first stroke, Pearl's brother, Harkrider, came from Chicago and, without her consent, removed papers from her lockbox and later demanded Wilcox relinquish the power of attorney. Pearl reiterated to Wilcox that she wished him to retain the appointment, and on April 16, 1980, had a new will drawn which removed her brother Harkrider, as a beneficiary.

Pearl suffered a second stroke on March 18, 1981, leaving her mentally incompetent as determined by the trial court on July 24, 1981. The court also named Lafayette Bank & Trust (appellee herein) as guardian of Pearl's estate and, on September 9, 1981, named Wilcox as the guardian of her person, rejecting Harkrider's and Purdue National Bank's applications. Pearl died on March 19, 1982.

Harkrider then filed an interlocutory appeal contesting the trial court's orders, but was denied relief on July 20, 1983, by way of memorandum opinion. Harkrider's petitions for rehearing and transfer were denied.

A year later, in September 1984, on Harkrider's motion, the present case was venued from Tippecanoe County to the Fountain Circuit Court. On March 4, 1985, the trial court, after hearing evidence, entered its order terminating the guardianship, approving the guardians' final report and two supplements, and approving various expenses and

attorneys' fees for the guardians for work of appellee law firms Hanna, Gerde & Meade and Stuart & Branigan. Harkrider appeals this judgment as well as all prior awards of expenses and attorneys' fees in this case.

Harkrider's motion to correct errors attempts to raise about fifty errors. Although Harkrider has narrowed this down to twelve issues, we have gone further by removing the issues decided in the previous appeal and those errors which are waived pursuant to Appellate Rule 8.3(A)(7), matters which will be detailed towards the end of this opinion. The remaining issues raised by Harkrider can be stated as:

1. Whether the trial court erred in granting petitions for payment of attorney fees, guardian fees, inheritance taxes and expenses of the estate.

2. Whether the trial court erred in ruling against Harkrider on any of the twenty allegations as set out in his fifth issue.

Another issue relating to the law of the case will be combined and discussed with the question addressed to damages relating to a frivolous appeal.

Assuming, without deciding, that Harkrider has standing to contest the trial court's judgment and that the appellee law firms were properly joined as parties by Harkrider on appeal, we address his allegations that the trial court erred in granting petitions for attorney and guardian fees, inheritance taxes and expenses of the estate.

IND. CODE 29-1-18-45 clearly permits reasonable compensation for attorney and guardian fees which are discretionary matters for the trial court. *Briggs v. Clin-*

ton County Bank & Trust Co., (1983) Ind.App., 452 N.E.2d 989, 1010. In the present case, the trial court heard evidence on these matters in hearings for two days wherein attorneys from each firm and the trust officer of the guardian bank, all subject to cross examination by Harkrider, testified on the petitions which detailed the time spent and hourly fees. The trial court also reduced the amount requested in one of the petitions, thus indicating the judge scrutinized the amounts requested. Likewise, Harkrider fails to demonstrate how the trial court erred in its approval of an advance to Wilcox for expenses in the estate, payment of Indiana inheritance taxes, and the transfer of property and cash to the executor of the estate upon the court's termination of the guardianship. We find the trial court's determinations entirely legitimate.

We turn next to Harkrider's fifth issue, which contains, as best as we can determine, a litany of some twenty allegations of error. In a not very strict application of A.R. 8.3(A)(7), which requires cogent argument and citation to aptlicable authorities, we find that only three items appear to qualify as issues. These are:

A. Whether the trial court erred in failing to require the guardian bank to inventory Pearl's mineral interest?

B. Whether the trial court erred in failing to require guardian bank to file [a supplemental or final] inventory?

C. Whether the trial court erred in failing to require guardian bank to account for income of the guardianship estate after December 24, 1984.

The record shows evidence and records relating to the above matters that: (A) no interest in a "mineral inter-

est", purportedly located in Stephens County, Oklahoma, was ever located, in spite of a search by the Bank; (B) after the filing of the initial inventory, no further assets were found which negated any need for supplemental inventories; and (C) an examination of supplemental reports shows that there was no income generated after December 24, 1984. It is patently clear, in our opinion, that Harkrider has failed to show an abuse of discretion.

The previously mentioned appeal was *In the Matter of the Guardianship of Pearl C. Posey, et al v. Floyd Wilcox, et al,* No. 2-482 A 105, filed July 20, 1983. The court on review held: (1) any error in the trial court's selection of guardians was moot due to the death of the ward, Pearl; (2) Wilcox's request for attorneys' fees and the Bank's petition for guardian and attorneys' fees were not yet improper since there was not yet a final accounting, therefore no appealable order; and (3) there was no error in the trial court order allowing attorney fees to Ann G. Davis (guardian ad litem for Pearl) and Davis's withdrawal of appearance from the case. Harkrider's attempt to reargue the issues decided in the previous appeal is void.

> The "law of the case" doctrine designates that an appellate court's determination of a legal issue is binding on both the trial court and the Court of Appeals in any subsequent appeal given the same case and substantially the same facts. *Fair Share Organization, Inc. v. Mitnick,* (1964) 245 Ind. 324, 198 N.E.2d 765, *cert. denied* 379 U.S. 843, 85 S.Ct. 82, 13 L.Ed.2d 48; *State v. Kuespert,* (1981) Ind. App., 425 N.E.2d 229, *trans. denied* (1982); *Hinds v. McNair,* (1980) Ind.App., 413 N.E.2d 586.

Cha v. Warnick (1985) Ind., 476 N.E.2d at 114.

In conclusion, we turn to the question of damages pursuant to A.R. 15(G).

We observe that Harkrider's appeal is poorly done in a number of respects. Harkrider has filed a two-volume appendix, totaling some 580 pages. While not a flaw of a reversible nature, encubering the record with needless redundancy is not to be encouraged. Harkrider's brief is deficient in a number of particulars. The brief is not double-spaced as specified in A.R. 8.2(A)(1). The statement of the case portion of the brief does not comply with A.R. 8.3(A)(4) for the reason that there is no verbatim statement of the judgment being appealed from, there are facts which are extraneous to the purpose of this rule, and the contents of the statement are far from being brief. The statement of facts as contemplated by A.R. 8.3(A)(5) is argumentative and conclusory, not in a narrative form, and represents a needless exercise of prolixity. A.R. 8.3(A)(7) defines the requirements of the argument section of the brief. Those authorities cited by Harkrider, in virtually every instance, are too general to be supportive of the purported issues being argued, and the argument lacks a cogency required for definitive appellate review.

Two other factors which evince bad faith, in our opinion, is the absence of a mention of the previous appeal by Harkrider and that the basis of many, if not all, of the issues is improperly founded upon ignoring or omitting facts established in the record or misstatement of existing fact. Additionally, Harkrider's brief "appears to have been written in a manner calculated to require the maximum expenditure of time both by [appellee] and by this court". *See: Briggs, supra.*

When viewed in its totality, Harkrider's appeal appears to be without merit and taken in bad faith. *See: Briggs, supra; Orr v. Turco Manufacturing Co.* (filed Aug. 6, 1986) Ind.App. No. 4-1084 A 292. Accordingly, we find that appellees are entitled to attorneys' fees.

The cause is remanded to the trial court for an award of such attorneys' fees as may be determined to be appropriate. The trial court's judgment is in all other respects affirmed. RATLIFF, J. AND NEAL, J. CONCUR.

APPENDIX B

IN THE COURT OF APPEALS
OF INDIANA

No. 1-685-A-146

MATTER OF GUARDIANSHIP OF	)	
PEARL C. POSEY, ADULT INCOMPETENT, RAYMOND HARKRIDER, RAYMOND HARKRIDER, AS EXECUTOR OF ESTATE OF GEORGIA CORY, DECEASED,	)	Appeal from Fountain Circuit Court
	)	The Honorable Vincent F. Grogg
BETTY ROGERS, JUNE NELSON,	)	
Appellants	)	
vs.	)	
LAFAYETTE BANK AND TRUST COMPANY, HANNA GERDE & MEADE, BALL EGGLESTONE BUMBLEBURG & McBRIDE, FLOYD WILCOX, STUART & BRANIGIN, VAUGHAN VAUGHAN & LAYDEN,	)	
Appellees	)	

PETITION FOR RE-HEARING

Come now the Appellants, Raymond Harkrider, Raymond Harkrider, as Executor of the Estate of Georgia Cory, Deceased, Betty Rogers and June Nelson, by coun-

sel, pursuant to Indiana Rules of Appellate Procedure, Appellate Rule 11, and for their Petition for Re-Hearing, show the Court as follows:

1. On June 30, 1981, the Appellants filed their Petition requesting that June Nelson be appointed Guardian of the Person, and the Purdue National Bank and Raymond Harkrider be appointed co-Guardians of the Estate of Pearl Posey (hereinafter "Pearl").

2. On July 21, 1981, Floyd Wilcox filed a Cross-Petition seeking the appointment of Floyd Wilcox (hereinafter "Mr. Wilcox") as Guardian of the Person and "a local bank other than the Purdue National Bank" as Guardian of the Estate of Pearl.

3. On July 27, 1981, the trial court entered its Order appointing Lafayette Bank and Trust Company (hereinafter "Lafayette Bank") Guardian of Pearl's Estate.

4. On September 9, 1981, the trial court entered its Order appointing Mr. Wilcox Guardian of Pearl's Person.

5. In 1982, the Appellants initiated an interlocutory appeal seeking review of the trial court's rulings to that date, and on June 20, 1983, this Court rendered its Memorandum Decision therein.

6. On March 11, 1985, the trial court entered its Order Approving Supplemental Report of Distribution and Discharging Guardian.

7. On September 3, 1986, this Court rendered its Memorandum Decision affirming the Judgment of the trial court in all respects and assessing the Appellants with costs pursuant to Appellate Rule 15(G).

8. Said Memorandum Decision is in error in that there exists a conflict between said Memorandum Decision and the following prior opinions of this Court, which opinions hold that failure to comply with the Indiana Rules of Appellate Procedure does not indicate frivolousness or bad faith for purposes of Appellate Rule 15(G):

A. *Briggs vs. Clinton County Bank and Trust*, (Ind. App. 2 Dist. 1983) 452 N.E.2d 989;

B. *Andock vs. Taylor Construction Corp.*, (Ind.App. 3 Dist.) 416 N.S.2d 882;

C. *Inter-City Contractors vs. Consumer Building* (3 Dist. 1978) 175 Ind.App. 665, 373 N.E.2d 903.

9. Said Memorandum Decision is in error in that said Memorandum Decision is in conflict with this Court's Opinion in *First National Bank of Danville vs. Reynolds, et al.*, (Ind.App. 4 Dist. 1986) 491 N.E.2d 218, in which this Court held that the mere fact that an appeal was meritless, without more, does not warrant imposition of appellate costs pursuant to Appellate Rule 15(G).

10. Said Memorandum Decision is in conflict with this Court's Opinion in *Fleetwood Corporation vs. Mirich et al.*, (Ind.App. 3 Dist. 1980) 404 N.E.2d 38, in which this Court held that imposition of costs pursuant to Appellate Rule 15(G) is inappropriate in cases in which several close questions of law are raised by the Appellant.

11. Said Memorandum Decision erroneously decides the following new question of law in the State of Indiana:

Whether the Appellants' filing of a separately bound appendix pursuant to Appellate Rule 8.2(A)(4) evidences bad faith or vexatiousness for purposes of the sanctions contemplated in Appellate 15(G)?

12. Said Memorandum Decision is in error in that this Court abused its discretion therein in making the following findings:

A. The Appellants' appellate materials reflect "the absence of a mention of the previous appeal". See: Appellants' September 10, 1985 "Petition that Record of Proceedings in Prior Appeal be Made and Considered Part of Record of this Appeal", granted by this Court on September 26, 1985, Appellants' Pre-Appeal Statement, at pp. 6-8; Appellants' Brief, at pp. 22; Appellants' Reply Brief to Branigin, pp. 33-40.

B. "The basis of many, if not all, of the issues is improperly founded upon ignoring or omitting facts established in the record or misstatement of existing fact."

C. The Appellants' Brief "appears to have been written in a manner calculated to require maximum expenditure of time both by [appellee] and by this Court".

13. Said Memorandum Decision fails to give a statement in writing on each of the following substantial questions arising on the record and argued by the parties:

A. Whether the trial court's July 27, 1981 Order appointing Lafayette Bank Guardian of Pearl's Estate was void for lack of strict compliance with I.C. 29-1-18-1 *et. seq.*? Said substantial issue arising on the record was argued by the Appellants at pp. 39-47 of their Appellants' Brief.

B. Whether, if Mr. Wilcox's Petition for Appointment of Guardian was void for lack of compliance with I.C. 29-1-18-1 *et. seq.*, he, Lafayette Bank and/or their lawyers are entitled to payment of their fees from Pearl's Estate? Said substantial issue arising on the record was argued by the Appellants at pp. 39-47 and 82-84 of their Appellants' Brief.

C. Whether the trial court abused its discretion in entering its March 26, 1984 Order overruling the Appellants' March 20, 1984 Motion to Disqualify Stuart and Branigin based upon Stuart and Branigin's possession of confidential information obtained from Raymond Harkrider in his initial consultation with Stuart and Branigin as a prospective client? Said substantial issue arising on the record was argued by the Appellants at pp. 63 and 68-71 of their Appellants' Brief.

D. Whether, if the trial court abused its discretion in overruling the Appellants' Motion to Disqualify Stuart and Branigin, Stuart and Branigin is entitled to payment of its fees from Pearl's Guardianship Estate? Said substantial issue arising on the record was argued by the Appellants at pp. 61-63 and 68-71 of their Appellants' Brief.

E. Whether the trial court abused its discretion in appointing Mr. Wilcox Guardian of Pearl's Person based upon Mr. Wilcox's conflict of interest arising from prior dealings with Pearl expressly noted on the record by the trial court? Said substantial issue arising on the record was argued by the Appellants at pp. 23-24 and 71-72 of their Appellants' Brief.

F. Whether, if based upon Mr. Wilcox's conflict of interest, the trial court abused its discretion in appointing Mr. Wilcox Guardian of Pearl's Person, Mr. Wilcox and/or his lawyers are entitled to payment of their fees from Pearl's Guardianship Estate? Said substantial issue arising on the record was argued by the Appellants at pp. 61-63 and 68-71 of their Appellants' Brief.

G. Whether the trial court abused its discretion in failing to rule upon the Appellants' April 27, 1984 Motion to Compel Production of Documents seeking production of documentary evidence tending to prove that fees for legal services rendered by Stuart and Branigin to Mr. Wilcox individually were not included in Stuart and Branigin's Petitions for Attorney Fees

filed with the trial court seeking payment from Pearl's Guardianship Estate? Said substantial issue arising on the record was argued by the Appellants at pp. 79-80 and 92-94 of their Appellants' Brief.

H. Whether Appellants' Constitutional right to due process of law under Section 12, Article 1, of the Indiana Constitution and Amendments V and XIV of the U. S. Constitution, was violated as a result of *ex parte* rulings of the trial court and *ex parte* communications with Appellees' counsel? Said substantial issue arising on the record was argued by the Appellants at pages 8, 50-52 and 97-98 of their Appellants' Brief and pages 21-31 of Appellants' Reply Brief to Mr. Wilcox.

I. Whether, if Appellants' constitutional rights to due process were violated by *ex parte* rulings and communications, said rulings and related rulings are void? Said substantial issue arising on the record was argued by the Appellants at pages 50-52 of their Appellants' Brief and pages 21-31 of their Reply Brief to Mr. Wilcox.

J. Whether the Warren Circuit Court had exclusive jurisdiction to decide the validity of Pearl's April 16, 1980 Will and Appointment of Mr. Wilcox as Executor thereunder? Said substantial issue arising on the record was argued by the Appellants at page 90-91 of their Appellants' Brief.

K. If the Warren Circuit Court had exclusive jurisdiction to decide the validity of Pearl's April 16, 1980 Will and Appointment of Mr. Wilcox as Executor thereunder, whether the trial court abused its discretion in entering its March 11, 1985 Order Approving Supplemental Report of Distribution and Discharging Guardian? Said substantial issue arising on the record was argued by the Appellants at pages 90-91 of their Appellants' Brief.

14. To the extent that said Memorandum Decision can be construed as having held that any of the above argu-

ments were waived by Appellants for failure to comply with Appellate Rule 8.3(A)(7), said Memorandum Decision is in conflict with this Court's opinions in the following cases expressing the Court of Appeals' pre-disposition for deciding cases on the merits where a brief is in substantial compliance with the Appellate Rules:

1. *White House vs. Quinn,* (Ind.App. 2 Dist. 1982) 443 N.E.2d 332;

2. *State Department of Administration vs. Sightes,* (Ind.App. 1 Dist. 1981) 416 N.E.2d 445;

3. *Indiana State Board of Tax Commissioners vs. Lyon,* (3 Dist. 1977) 172 Ind.App. 272, 359 N.E.2d 931;

4. *Yerkes vs. Washington Manufacturing Company,* (1 Dist. 1975) 163 Ind.App. 692, 326 N.E.2d 629;

5. *Moore vs. Funk,* (3 Dist. 1973) 155 Ind.App. 545, 293 N.E.2d 534.

15. To the extent that said Memorandum Decision can be construed as having held that any of the above issues have been rendered moot by this Court's decision in *In the Matter of the Guardianship of Pearl C. Posey, et al. vs. Floyd Wilcox, et al.,* No. 2-482 A 105, filed July 20, 1983, said Memorandum Decision contravenes the following ruling precedents of the Supreme Court and is in conflict with the following prior opinions of this Court in that the facts and significance thereof giving rise to this appeal are not substantially the same as those giving rise to said prior interlocutory appeal:

1. *Cha vs. Warnick,* (Ind. 1985) 476 N.E.2d 109, *cert. denied* 106 S.Ct. 249;

2. *State vs. Kuespert,* (Ind.App. 1 Dist. 1981) 425 N.E.2d 229, *trans. denied* (1982);

3. *Hinds vs. McNair,* (Ind.App. 4 Dist. 1980) 413 N.E.2d 586;

4. *Fair Share Organization vs. Mitnick,* (1964) 245 Ind. 324, 198 N.E.2d 765, *cert. denied* 379 U.S. 843, 85 S.Ct. 82, 13 L.Ed.2d 48.

WHEREFORE, the Appellants respectfully pray that this Court grant their Petition for Re-Hearing, that this Court vacate its September 3, 1986 Memorandum Decision, that this Court reverse the trial court's Order Approving Supplemental Report of Distribution and Discharging Guardian, that Lafayette Bank be surcharged with all credits approved by the trial court in the Guardianship Estate of Pearl C. Posey, and for all other relief just and proper in the premises.

Respectfully submitted,

KROGER, GARDIS & REGAS

By /s/ Douglas R. Brown, Attorneys
Douglas R. Brown, Attorneys
for Appellants

KROGER, GARDIS & REGAS
700 Guaranty Building
Indianapolis, IN 46204-3059
317 634-6328

(Proof of Service Omitted in Printing)

APPENDIX C

STATE of INDIANA
Clerk of the Supreme Court
and Court of Appeals
Marjorie H. O'Laughlin,
Clerk
217 State House

Indianapolis, 46204

Telephone 232-1930

No. 1-685 A 146

Pearl C. Posey, et al —v— Lafayette Bank and Trust Company, et al

You are hereby notified that the Court of Appeals has on this day Appellant's Petition for Rehearing DENIED. Buchanan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 14th day of October, 1986.

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

APPENDIX D

IN THE
SUPREME COURT OF INDIANA

NO. 1-685 A 146

MATTER OF GUARDIANSHIP OF	)	
PEARL C. POSEY, ADULT INCOMPETENT,	)	Appeal from
RAYMOND HARKRIDER,	)	Fountain Circuit
RAYMOND HARKRIDER, AS EXECUTOR OF ESTATE OF GEORGIA CORY, DECEASED.,	)	Court
BETTY ROGERS, JUNE NELSON,	)	The Honorable Vincent F. Grogg
Appellants	)	
vs.	)	
LAFAYETTE BANK AND TRUST COMPANY, HANNA, GERDE & MEADE, BALL EGGLESTON, BUMBLEBURG & McBRIDE, FLOYD WILCOX, STUART & BRANIGIN, ANN G. DAVIS, VAUGHAN, VAUGHAN & LAYDEN,	)	
Appellees	)	

PETITION TO TRANSFER

Come now the Appellants, Raymond Harkrider, Raymond Harkrider as Executor of the Estate of Georgia Corey, Deceased, Betty Rogers and June Nelson (herein-

after "Pearl's Family"), by counsel, pursuant to Indiana Rules of Appellate Procedure, Appellate Rule 11, and for their Petiton to Transfer, show the Court as follows:

1. On September 3, 1986, the Indiana Court of Atpeals rendered its Memorandum Decision in this Cause affirming the Judgment of the trial court in all respects and assessing costs pursuant to Appellate Rule 15(G).

2. Said Memorandum Decision was against Pearl's Family. On September 23, 1986, Pearl's Family timely filed their Petition for Re-Hearing, which Petition for Re-Hearing was denied by the Court of Appeals on October 14, 1986.

3. Said Memorandum Decision is in error in that there exists a conflict between said Memorandum Decision and the following prior opinions of the Court of Appeals, which opinions hold that failure to comply with the Indiana Rules of Aptellate Procedure does not indicate frivolousness or bad faith for purposes of Appellate Rule 15(G):

A. *Briggs vs. Clinton County Bank and Trust*, (Ind. App. 2 Dist. 1983) 452 N.E.2d 989;

B. *Andock vs. Taylor Construction Corp.*, (Ind.App. 3 Dist.) 416 N.E.2d 882;

C. *Inter-City Contractors vs. Consumer Building*, (3 Dist. 1978) 175 Ind.App. 665, 373 N.E.2d 903.

4. Said Memorandum Decision is in error in that said Memorandum Decision is in conflict with the Court of Appeals' Opinion in *First National Bank of Danville vs. Reynolds, et al.*, (Ind.App. 4 Dist. 1986) 491 N.E.2d 218, in which the Court of Appeals held that the mere fact that an appeal was meritless, without more, does not warrant

imposition of appellate fees and costs pursuant to Appellate Rule 15(G).

5. Said Memorandum Decision is in conflict with the Court of Appeal's Opinion in *Fleetwood Corporation vs. Mirich et al.*, (Ind.App. 3 Dist. 1980) 404 N.E.2d 38, in which the Court of Appeals held that imposition of sanctions pursuant to Appellate Rule 15(G) is inappropriate in cases in which several close questions of law are raised by the Appellant.

6. Said Memorandum Decision erroneously decides the following new question of law in the State of Indiana:

> Whether the Appellants' filing of a separately bound appendix pursuant to Appellate Rule 8.2(A)(4) evidences bad faith or vexatiousness for purposes of the sanctions contemplated in Appellate 15(G)?

7. Said Memorandum Decision fails to give a statement in writing on each of the following substantial questions arising on the record and argued by the parties:

> A. Whether the trial court's July 27, 1981 Order appointing Lafayette Bank Guardian of Pearl's Estate was void for lack of strict compliance with I.C. 29-1-18-1 *et. seq.?* Said substantial issue arising on the record was argued by the Appellants at pp. 38-47 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record p. 1216; Motion to Correct Errors, Record, p. 1274.)
>
> B. Whether, if Mr. Wilcox's Cross-Petition for Appointment of Guardian was void for lack of compliance with I.C. 29-1-18-1 *et. seq.*, the, Lafayette Bank and/or their lawyers are entitled to payment of their fees from Pearl's Estate? Said substantial issue arising on the record was argued by the Appellants at pp. 39-47 and 82-84 of their Appellants' Brief. (See also:

Objections and Exceptions to Guardians Final Report, Record p. 1116; Motion to Correct Errors, Record, p. 1274.)

C. Whether the trial court abused its discretion in entering its March 26, 1984 Order overruling the Appellants' March 20, 1984 Motion to Disqualify Stuart and Branigin based upon Stuart and Branigin's possession of confidential information obtained from Raymond Harkrider in his initial consultation with Stuart and Branigin as a prospective client? Said substantial issue arising on the record was argued by the Appellants at pp. 61-63 and 68-71 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record pp. 1191-1193; Motion to Correct Errors, Record, pp. 1243-1245.)

D. Whether, if the trial court abused its discretion in overruling the Appellants' Motion to Disqualify Stuart and Branigin, Stuart and Branigin is entitled to payment of its fees from Pearl's Guardianship Estate? Said substantial issue arising on the record was argued by the Appellants at pp. 61-63 and 68-71 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record pp. 1189-1208; Motion to Correct Errors, Record, pp. 1239-1256.)

E. Whether the trial court abused its discretion in appointing Mr. Wilcox Guardian of Pearl's Person based upon Mr. Wilcox's conflict of interest arising from prior dealings with Pearl expressly noted on the record by the trial court? Said substantial issue arising on the record was argued by the Appellants at pp. 23-24, 63-66 and 71-72 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record pp. 1192, 1194; Motion to Correct Errors, Record, pp. 1270-1274,1297.)

F. Whether, if based upon Mr. Wilcox's conflict of interest, the trial court abused its discretion in ap-

pointing Mr. Wilcox Guardian of Pearl's Person, Mr. Wilcox and/or his lawyers are entitled to payment of their fees from Pearl's Guardianship Estate? Said substantial issue arising on the record was argued by the Appellants at pp. 61-66 and 68-71 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record pp. 1189-1196; Motion to Correct Errors, Record, pp. 1243-1248.)

G. Whether the trial court abused its discretion in not granting Appellants' April 27, 1984 Motion to Compel Production of Documents seeking production of documentary evidence tending to prove that fees for legal services rendered by Stuart and Branigin to Mr. Wilcox individually were not included in Stuart and Branigin's Petitions for Attorney Fees filed with the tritl court seeking payment from Pearl's Guardianship Estate? Said substantial issue arising on the record was argued by the Appellants at pp. 79-80 and 92-94 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record pp. 1202-1204; Motion to Correct Errors, Record, pp. 1250-1254.)

H. Whether Appellants' Constitutional right to due process of law under Section 12, Article 1, of the Indiana Constitution and Amendments V and XIV of the U.S. Constitution, was violated as a result of *ex parte* rulings of the trial court and *ex parte* communications with Appellees' counsel? Said substantial issue arising on the record was argued by the Appellants at pages 8, 50-52 and 97-98 of their Appellants' Brief and pages 21-31 of Appellants' Reply Brief to Mr. Wilcox. (See also: Objections and Exceptions to Guardians Final Report, Record pp. 1216,1221; Motion to Correct Errors, Record, pp. 1274,1282-1295.)

I. Whether, if Appellants' constitutional rights to due process were violated by *ex parte* rulings and communications, said rulings and related rulings are void? Said substantial issue arising on the record

was argued by the Appellants at pages 50-52 of their Appellants' Brief and pages 21-31 of their Reply Brief to Mr. Wilcox. (See also: Objections and Exceptions to Guardians Final Report, Record pp. 1216, 1221; Motion to Correct Errors, Record, pp. 1274,1282-1295.)

J. Whether the Warren Circuit Court had exclusive jurisdiction to decide the validity of Pearl's April 16, 1980 Will and Appointment of Mr. Wilcox as Executor thereunder? Said substantial issue arising on the record was argued by the Appellants at page 90-91 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record pp. 1222-1223; Motion to Correct Errors, Record, pp. 1266-1267.)

K. If the Warren Circuit Court held exclusive jurisdiction to decide the validity of Pearl's April 16, 1980 Will and Appointment of Mr. Wilcox as Executor thereunder, whether the trial court abused its discretion in entering its March 11, 1985 Order Approving Supplemental Report of Distribution and Discharging Guardian? Said substantial issue arising on the record was argued by the Appellants at pages 90-91 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record pp. 1222-1223; Motion to Correct Errors, Record, pp. 1266-1267.)

8. To the extent that said Memorandum Decision can be construed as having held that any of the above arguments were waived by Appellants for failure to comply with Appellate Rule 8.3(A)(7), said Memorandum Decision is in conflict with the Court of Appeals' opinions in the following cases expressing the Court of Appeals' predisposition for deciding cases on the merits where a brief is in substantial compliance with the Appellate Rules:

1. *White House vs. Quinn,* (Ind.App. 2 Dist. 1982) 443 N.E.2d 332;

2. *State Department of Administration vs. Sightes,* (Ind.App. 1 Dist. 1981) 416 N.E.2d 445;

3. *Indiana State Board of Tax Commissioners vs. Lyon,* (3 Dist. 1977) 172 Ind.App. 272, 359 N.E.2d 931;

4. *Yerkes vs. Washington Manufacturing Company,* (1 Dist. 1975) 163 Ind.App. 692, 326 N.E.2d 629;

5. *Moore vs. Funk,* (3 Dist. 1973) 155 Ind.App. 545, 293 N.E.2d 534.

9. To the extent that said Memorandum Decision can be construed as having held that any of the above issues have been rendered moot by the Court of Appeals's decision in *In the Matter of the Guardianship of Pearl C. Posey, et al. vs. Floyd Wilcox, et al.,* No. 2-482 A 105, filed July 20, 1983, said Memorandum Decision contravenes the following ruling precedents of the Supreme Court and is in conflict with the following prior opinions of the Court of Appeals in that the facts and significance thereof giving rise to this appeal are not substantially the same as those giving rise to said prior appeal:

1. *Cha vs. Warnick,* (Ind. 1985) 476 N.E.2d 109, *cert. denied* 106 S.Ct. 249;

2. *State vs. Kuespert,* (Ind.App. 1 Dist. 1981) 425 N.E.2d 229, *trans. denied* (1982);

3. *Hinds vs. McNair,* (Ind. App. 4 Dist. 1980) 413 N.E.2d 586;

4. *Fair Share Organization vs. Mitnick,* (1964) 245 Ind. 324, 198 N.E.2d 765; *cert. denied* 379 U.S. 843, 85 S.Ct. 82, 13 L.Ed.2d 48.

WHEREFORE, the Appellants respectfully pray that this Court grant their Petition to Transfer, that this

Court vacate the Court of Appeals' September 3, 1986 Memorandum Decision, that this Court reverse the trial court's Order Approving Supplemental Report of Distribution and Discharging Guardian, that Lafayette Bank be surcharged with all credits approved by the trial court in the Guardianship Estate of Pearl C. Posey, and for all other relief just and proper in the premises.

Respectfully submitted,
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APPENDIX E

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IN THE
SUPREME COURT OF INDIANA

MATTER OF GUARDIANSHIP OF	)	
PEARL C. POSEY, ADULT INCOMPETENT, RAYMOND HARKRIDER AS EXECUTOR OF THE ESTATE OF GEORGIA COREY, DECEASED, BETTY ROGERS AND JUNE NELSON,	)	No. 23S01-8708-CV-771 in the Supreme Court
Appellants,	)	
v.	)	No. 1-685-A-146 in the Court of Appeals

LAFAYETTE BANK AND TRUST COMPANY, HANNA, GERDE & MEADE, BALL, EGGLESTON, BUMBLEBURG & McBRIDE, FLOYD WILCOX, STUART & BRANIGIN, ANN G. DAVIS AND VAUGHAN, VAUGHAN & LAYDEN,	)	(Filed Aug. 25, 1987)
Appellees.	)	

APPEAL FROM THE FOUNTAIN CIRCUIT COURT
The Honorable Vincent Grogg, Judge
No. 84-C-215

ON CIVIL PETITION TO TRANSFER

DICKSON, J.

This is one of three cases[1] in which we have been asked to review the propriety of a punitive award of attorney fees under Appellate Rule 15(G) of the Indiana Rules of Procedure. In the other two cases, we reversed decisions of the Court of Appeals imposing attorney fees. In order to provide guidance to the bench and bar as to circumstances when such fees are appropriate, we grant transfer herein solely for the purpose of addressing the AR 15(G) issue. Pursuant to Appellate Rule 11(B)(3), we decline to address the remaining issues and summarily affirm the opinion of the Court of Appeals thereon.

Following its discussion of issues presented by the appeal, the Court of Appeals below, finding that the appeal

---

[1]*Orr v. Turco Mfg. Co.* (1987), Ind., No. 29S04-8708-CV-769; *Lesher v. Baltimore Football Club* (1987), Ind. No. 49S04-8708-CV-770.

was without merit and taken in bad faith, remanded to the trial court for determination of the appropriate appellee's attorney fees to be imposed upon appellant.

The Court of Appeals found bad faith from appellant's disregard of the form and content requirements of Appellate Rules 8.2(A)(1), 8.3(A)(4), 8.3(A)(5), and 8.3 (A)(7); failure to disclose his previous appeal raising many of the same issues; omission and misstatement of facts established in the record; and because appellant's brief appeared "to have been written in a manner calculated to require the maximum expenditure of time both by [appellee] and by this Court." *See, Briggs v. Clinton County Bank and Trust Co.* (1983), Ind.App., 452 N.E.2d 989, 1010.

These are circumstances significantly more grave than mere lack of merit. Gross abuse of the right to appellate review "crowds our court to the detriment of meritorious actions, and should not go unrebuked." *Marshall v. Reeves* (1974), 262 Ind. 403, 404, 316 N.E.2d 828, 830 (quoting *Vandalia Railroad Co. v. Walsh* (1909), 44 Ind.App. 297, 299, 89 N.E. 320).

- We affirm the decision of the Court of Appeals remanding this cause to the trial court for an award of such attorney fees as may be determined to be appropriate.

SHEPARD, C.J., and DeBRULER, GIVAN and PIVARNIK, JJ., concur.

APPENDIX F

IN THE
SUPREME COURT OF INDIANA
NO. 23501-8708-CV-00771

MATTER OF GUARDIANSHIP OF PEARL C. POSEY, ADULT INCOMPETENT RAYMOND HARKRIDER, RAYMOND HARKRIDER, AS EXECUTOR OF ESTATE OF GEORGIA CORY, DECEASED., BETTY ROGERS, JUNE NELSON, Appellants vs. LAFAYETTE BANK AND TRUST COMPANY, HANNA, GERDE & MEADE, BALL, EGGLESTON, BUMBLEBURG & McBRIDE, FLOYD WILCOX, STUART & BRANIGIN, ANN G. DAVIS, VAUGHAN, VAUGHAN & LAYDEN, Appellees.	Appeal from the Fountain Circuit Court The Honorable Vincent F. Grogg (Filed September 14, 1987)

PETITION FOR REHEARING

Come now the Appellants, Raymond Harkrider, Raymond Harkrider as Executor of the Estate of Georgia

Cory, Deceased, Betty Rogers and June Nelson (hereinafter "Pearl's Family"), by counsel, pursuant to Indiana Rules of Appellate Procedure, Appellate Rule 11, and for its Petition for Rehearing, shows the Court as follows:

1. On September 3, 1986, the Indiana Court of Appeals rendered its Memorandum Decision in this cause affirming the Judgment of the trial court in all respects and assessing costs against Pearl's Family pursuant to Indiana Rules of Appellate Procedure, Appellate Rule 15(G).

2. On September 23, 1986, Pearl's Family timely filed its Petition for Rehearing, which Petition for Rehearing was denied by the Court of Appeals on October 14, 1986.

3. On November 3, 1986, Pearl's Family timely filed its Petition to Transfer with this Court.

4. On August 25, 1987, this Court filed its Opinion granting Pearl's Family Petition to Transfer and affirming the Court of Appeal's Memorandum Decision in all respects.

5. Said Opinion is in error in that it improperly overrules the following well reasoned opinions of the Court of Appeals, which opinions hold that failure to comply with the Indiana Rules of Appellate Procedure does not indicate frivolousness or bad faith for purposes of Appellate Rule 15(G):

A. *Briggs vs. Clinton County Bank and Trust*, (Ind. App. 2 Dist. 1983) 452 N.E.2d 989;

B. *Andock vs. Taylor Construction Corp.*, (Ind.App. 3 Dist.) 416 N.E.2d 882;

C. *Inter-City Contractors vs. Consumer Building*, (3 Dist. 1978) 175 Ind.App. 665, 373 N.E.2d 903.

6. Said Opinion is in error in that it improperly overrules the Court of Appeals' well reasoned opinion in *First National Bank of Danville vs. Reynolds, et al.,* (Ind. App. 4 Dist. 1986) 491 N.E.2d 218, in which the Court of Appeals held that the mere fact that an appeal was meritless, without more, does not warrant imposition of appellate fees and costs pursuant to Appellate Rule 15(G).

7. Said Opinion is in error in that it improperly overrules the Court of Appeals' well reasoned opinion in *Fleetwood Corporation vs. Mirich et al.,* (Ind.App. 3 Dist. 1980) 404 N.E.2d 38, in which the Court of Appeals held that imposition of sanctions pursuant to Appellate Rule 15(G) is inappropriate in cases in which several close questions of law are raised by the Appellant.

8. Said Opinion erroneously decides the following new question of law in the State of Indiana:

> Whether the Appellants' filing of a separately bound appendix pursuant to Appellate Rule 8.2(A)(4) evidences bad faith or vexatiousness for purposes of the sanctions contemplated in Appellate 15(G)?

9. In simply incorporating the Court of Appeals' Memorandum Decision by reference, said Opinion erroneously affirms the Court of Appeals' failure to give a statement in writing on each of the following substantial questions arising on the record and argued by the parties, both on appeal and on transfer:

> A. Whether the trial court's July 27, 1981 Order appointing Lafayette Bank Guardian of Pearl's Estate was void for lack of strict compliance with I.C. 29-1-18-1 *et. seq.*? Said substantial issue arising on the record was argued by the Appellants at pp. 20-24 of

their Brief in Support of Petition to Transfer and pp. 38-47 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record, p. 1216; Motion to Correct Errors, Record, p. 1274.)

B. Whether, if Mr. Wilcox's Cross-Petition for Appointment of Guardian was void for lack of compliance with I.C. 29-1-18-1 *et. seq.*, he, Lafayette Bank and/or their lawyers are entitled to payment of their fees from Pearl's Estate? Said substantial issue arising on the record was argued by the Appellants at p. 29 of their Brief in Support of Petition to Transfer and pp. 39-47 and 82-84 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record, p. 1116; Motion to Correct Errors, Record, p. 1274.)

C. Whether the trial court abused its discretion in entering its March 26, 1984 Order overruling the Appellants' March 20, 1984 Motion to Disqualify Stuart and Branigin based upon Stuart and Branigin's possession of confidential information obtained from Raymond Harkrider in his initial consultation with Stuart and Branigin as a prospective client? Said substantial issue arising on the record was argued by the Appellants at pp. 35-40 of their Brief in Support of Petition to Transfer and pp. 61-63 and 68-71 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record, pp. 1191-1193; Motion to Correct Errors, Record, pp. 1243-1245.)

D. Whether, if the trial court abused its discretion in overruling the Appellants' Motion to Disqualify Stuart and Branigin, Stuart and Branigin is entitled to payment of its fees from Pearl's Guardianship Estate? Said substantial issue arising on the record was argued by the Appellants at pp. 35-40 of their Brief in Support of Petition to Transfer and pp. 61-63 and 68-71 of their Appellants' Brief. (See also:

Objections and Exceptions to Guardians Final Report, Record, pp. 1189-1208; Motion to Correct Errors, Record, pp. 1239-1256.)

E. Whether the trial court abused its discretion in appointing Mr. Wilcox Guardian of Pearl's Person based upon Mr. Wilcox's conflict of interest arising from prior dealing with Pearl expressly noted on the record by the trial court? Said substantial issue arising on the record was argued by the Appellants at pp. 25-28 of their Brief in Support of Petition to Transfer and pp. 23-24, 63-66 and 71-72 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record, pp. 1192, 1194; Motion to Correct Errors, Record, pp. 1270-1274, 1297.)

F. Whether, if based upon Mr. Wilcox's conflict of interest, the trial court abused its discretion in appointing Mr. Wilcox Guardian of Pearl's Person, Mr. Wilcox and/or his lawyers are entitled to payment of their fees from Pearl's Guardianship Estate? Said substantial issue arising on the record was argued by the Appellants at pp. 25-28 of their Brief in Support of Petition to Transfer and pp. 61-66 and 68-71 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record, pp. 1189-1196; Motion to Correct Errors, Record, pp. 1243-1248.)

G. Whether the trial court abused its discretion in not granting the Appellants' April 27, 1984 Motion to Compel Production of Documents seeking production of documentary evidence tending to prove that fees for legal services rendered by Stuart and Branigin to Mr. Wilcox individually were not included in Stuart and Branigin's Petitions for Attorney Fees filed with the trial court seeking payment from Pearl's Guardianship Estate? Said substantial issue arising on the record was argued by the Appellants at pp. 79-80 and 92-94 of their Appellants' Brief. (See

also: Objections and Exceptions to Guardians Final Report, Record pp. 1202-1204: Motion to Correct Errors, Record, pp. 1250-1254.)

H. Whether Appellants' Constitutional right to due process of law under Article 1, Section 12, of the Indiana Constitution and Amendments V and XIV of the U.S. Constitution, was violated as a result of *ex parte* rulings of the trial court and *ex parte* communications with Appellees' counsel? Said substantial issue arising on the record was argued by the Appellants at pp. 42-44 of their Brief in Support of Petition to Transfer, pp. 8, 50-52 and 97-98 of their Appellants' Brief and pp. 21-31 of Appellants' Reply Brief to Mr. Wilcox. (See also: Objections and Exceptions to Guardians Final Report, Record, pp. 1216, 1221; Motion to Correct Errors, Record, pp. 1274, 1282-1295.)

I. Whether, if Appellants' constitutional rights to due process were violated by *ex parte* rulings and communications, said rulings and related rulings are void? Said substantial issue arising on the record was argued by the Appellants at pp. 42-44 of their Brief in Support of Petition to Transfer, pp. 50-52 of their Appellants' Brief and pp. 21-31 of their Reply Brief to Mr. Wilcox. (See also: Objections and Exceptions to Guardians Final Report, Record, pp. 1216, 1221; Motion to Correct Errors, Record, pp. 1274, 1282-1295.)

J. Whether the Warren Circuit Court had exclusive jurisdiction to decide the validity of Pearl's April 16, 1980 Will and Appointment of Mr. Wilcox as Executor thereunder? Said substantial issue arising on the record was argued by the Appellants at pp. 32-35 of their Brief in Support of Petition to Transfer and pp. 90-91 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record, pp. 1222-1223; Motion to Correct Errors, Record pp. 1266-1267.)

K. If the Warren Circuit Court has exclusive jurisdiction to decide the validity of Pearl's April 16, 1980 Will and Appointment of Mr. Wilcox as Executor thereunder, whether the trial court abused its discretion in entering its March 11, 1985 Order Approving Supplemental Report of Distribution and Discharging Guardian? Said substantial issue arising on the record was argued by the Appellants at pp. 32-35 of their Brief in Support of Petition to Transfer and at pp. 90-91 of their Appellants' Brief. (See also: Objections and Exceptions to Guardians Final Report, Record, pp. 1222-1223; Motion to Correct Errors, Record, pp. 1266-1267.)

10. To the extent that said Opinion can be construed as having affirmed a holding by the Court of Appeals that any of the above issues have been rendered moot or *res judicata* by the Court of Appeals' prior decision in *In the Matter of the Guardianship of Pearl C. Posey, et al. vs. Floyd Wilcox, et al.*, No. 2-482 A 105, filed July 20, 1983, said Opinion is in conflict with the following ruling precedents of this Court, and improperly overrules the following well reasoned opinions of the Court of Appeals, in that the facts and significance thereof giving rise to this appeal are not substantially the same as those give rise to said prior appeal:

1. *Cha vs. Warnick*, (Ind. 1985) 476 N.E.2d 109, *cert. denied* 106 S.Ct. 249;

2. *State vs. Kuespert*, (Ind.App. 1 Dist. 1981) 425 N.E.2d 229, *trans. denied* (1982);

3. *Hinds vs. McNair*, (Ind.App. 4 Dist. 1980) 413 N.E.2d 586;

4. *Fair Share Organization vs. Mitnick*, (1964) 245 Ind. 324, 198 N.E.2d 765, *cert. denied* 379 U.S. 843, 85 S.Ct. 82, 13 L.Ed.2d 48.

11. To the extent that said Opinion can be construed as having affirmed a holding by the Court of Appeals that any of the above arguments were waived by Appellants for failure to comply with Appellate Rule 8.3(A)(7), said Opinion violates Article 7, Section 6 of the Indiana Constitution and is in error in that it denies Pearl's Family its right to one appeal and improperly overrules the following well reasoned opinions expressing Indiana Appellate Court's pre-disposition for deciding cases on the merits where procedural rules have been substantially complied with:

1. *Soft Water Utilities Inc. v. LeFevre,* (Ind. 1973) 301 N.E.2d 745.

2. *White House vs. Quinn,* (Ind.App. 2 Dist. 1982) 443 N.E.2d 332;

3. *State Department of Administration vs. Sightes,* (Ind.App. 1 Dist. 1981) 416 N.E.2d 445;

4. *Indiana State Board of Tax Commissioners vs. Lyon,* (3 Dist. 1977) 163 Ind.App. 272, 359 N.E.2d 931;

5. *Yerkes vs. Washington Manufacturing Company,* (1 Dist. 1975) 163 Ind.App. 692, 326 N.E.2d 629;

6. *Moore vs. Funk,* (3 Dist. 1973) 155 Ind.App. 545, 293 N.E.2d 534.

12. Said Opinion violates Article 1, Section 12, and Article 7, Section 6, of the Indiana Constitution, and further violates the 14th Amendment to the United States Constitution, in failing to afford Pearl's Family its constitutional right to due process and equal protection after denial of said right in the trial court.

13. The Court of Appeals' imposition of Appellate costs pursuant to Appellate Rule 15(G), and this Court's

affirmation thereof, violate Pearl's Family's right to due process and equal protection under the law guaranteed it by Article 1, Section 12, of the Indiana Constitution and the 14th Amendment to the United States Constitution.

14. Said Opinion is in conflict with the following opinions of this Court:

1. *Orr v. Turco Mfg. Co.* (1987), Ind., No. 29S04-8708-CV-769;

2. *Lesher v. Baltimore Football Club* (1987) Ind., No. 49S04-8708-CV-770.

15. On or about May 28, 1982, one of the Appellant's, Raymond Harkrider, consulted with Justice Brent E. Dixon, concerning the facts and allegations made the subject of this section, for the purpose of retaining the honorable Justice's services in his prior capacity as a Lafayette trial lawyer. The occurrence of this conference was brought to the attention of the undersigned counsel at 11:00 a.m., Monday, September 14, 1987, and has been made the subject of Pearl's Family's Notice of Newly Discovered Circumstances filed contemporaneously herewith.

WHEREFORE, the Appellants respectfully pray that this Court grant their Petition for Rehearing, that this Court vacate its August 25, 1987 Opinion, that this Court vacate the Court of Appeals' September 3, 1986 Memorandum Decision, that this Court reverse the trial court's Order Approving Supplemental Report of Distribution and Discharging Guardian, that Lafayette Bank be surcharged with all credits approved by the trial court in the Guardianship Estate of Pearl C. Posey, and for all other relief just and proper in the premises.

Respectfully submitted,

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By: /s/ Douglas R. Brown
Douglas R. Brown
Attorney for Appellants

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(Proof of Service Omitted in Printing)

APPENDIX G

IN THE
SUPREME COURT OF INDIANA

MATTER OF GUARDIANSHIP OF	)	
PEARL C. POSEY, ADULT INCOMPETENT	)	
RAYMOND HARKRIDER,	)	No. 23S01-8708-CV-771
RAYMOND HARKRIDER, AS EXECUTOR OF ESTATE OF GEORGIA CORY, DECEASED,	)	
BETTY ROGERS, JUNE NELSON,	)	(Filed November 9, 1987)
Appellants,	)	
v.	)	
LAFAYETTE BANK AND TRUST COMPANY, HANNA, GERDE & MEADE, BALL, EGGLESTON, BUMBLEBURG & McBRIDE, FLOYD WILCOX, STUART & BRANIGIN, ANN G. DAVIS, VAUGHAN, VAUGHAN & LAYDEN,	)	
Appellees.	)	

ORDER DENYING PETITION FOR REHEARING

In an opinion handed down August 25, 1987, this Court granted transfer and affirmed the Court of Appeals. This was done "in order to provide guidance to the bench and Bar as to the circumstances when such fees are appropri-

ate." Although at the time of the writing of Justice Dickson's opinion, the opinion of the Court of Appeals had not been published, Judge Robertson has since entered an Order that said opinion be published.

In view of the allegations by appellants, Justice Dickson has stated that he has no recollection of a meeting with Raymond Harkrider concerning this case, however, "in deference to the spirit and the letter of Canon 2" he disqualified himself from participation.

Following Justice Dickson's disqualification the case was assigned to Justice Givan for examination of the "Petition for Rehearing." After consideration of Justice Givan's memorandum on this case, it is the decision of the members of this Court that the petition for rehearing should be denied.

It is THEREFORE ORDERED that appellant's "Petition for Rehearing" heretofore filed in this cause is DENIED.

The Clerk of this Court is hereby ordered to forward a copy of this Order to all parties of record.

DONE this 9th day of November, 1987, in Indianapolis, Indiana.

/s/ Randall T. Shepard
Chief Justice of Indiana

Shepard, C.J., DeBruler, Givan and Pivarnik, JJ., vote to deny. Dickson, J., not participating.

APPENDIX H

IN THE
COURT OF APPEALS OF INDIANA

NO. 1-685 A 146

GUARDIANSHIP OF MATTER OF PEARL C. POSEY—ADULT INCOMPETENT	Judge: HON. VINCENT F. GROGG
RAYMOND HARKRIDER, GEORGIA CORY, BETTY ROGERS AND JUNE NELSON, appellants	Trial court no. 84-C-215
vs	Court: FOUNTAIN CIRCUIT COURT on change of venue from TIPPECANOE CIRCUIT COURT no. G-58-81
LAFAYETTE BANK AND TRUST COMPANY, HANNA, GERDE & MEADE, BALL, EGGLESTON, BUMBLEBURG & McBRIDE, FLOYD WILCOX STUART & BRANIGIN, ANN G. DAVIS AND VAUGHAN, VAUGHAN & LAYDEN, appellees	(Filed September 10, 1985)

PETITION THAT RECORD OF PROCEEDINGS IN PRIOR APPEAL BE MADE AND CONSIDERED PART OF RECORD OF PROCEEDINGS IN THIS APPEAL

Appellants RAYMOND HARKRIDER, GEORGIA CORY, BETTY ROGERS and JUNE NELSON petition the Court that record of proceedings in prior appeal no. 2-482 A 105 be made and considered part of record in this appeal no. 1-685 A 146 and respectfully show:

1. In prior appeal no. 2-482 A 105 to this Court from various orders entered by Tippecanoe circuit court in matter of guardianship of Pearl C. Posey no. G-58-81 appellants on dates indicated filed following as record and supplemental record of proceedings in that appeal:

1.1—on June 3, 1982—RECORD OF PROCEEDINGS VOLUME I—containing pages numbered 1 thru 122;

1.2—on June 3, 1982—TRANSCRIPT OF EVIDENCE AND EXHIBITS VOLUME II—containing pages numbered 123 thru 385;

1.3—on June 3, 1982—TABLE OF CONTENTS—in separate volume containing approximately 6 pages; and

1.4—on October 12, 1982—SUPPLEMENTAL RECORD OF PROCEEDINGS—containing pages numbered 386 thru 435.

2. Items referred to in foregoing paragraph 1 and subparagraphs 1.1 thru 1.4 thereof are hereinafter collectively referred to as "record of proceedings in prior appeal."

3. Record of proceedings in prior appeal is duly certified and contains copies of pleadings and papers filed orders entered evidence and exhibits offered and received in Tippecanoe circuit court in matter of guardianship of Pearl C. Posey no. G-58-81 from commencement of those proceedings June 30, 1981, to and including August 5, 1982.

4. From appellants' pre-appeal statement and petition for permission to file appellants' brief in excess of 50 pages it appears that appellants present many issues for review in this appeal 1-685 A 146.

5. Appellants believe that most if not all of record of proceedings in prior appeal is pertinent and should be made and considered part of record of proceedings in this appeal 1-685 A 146.

WHEREFORE appellants respectfully petition the court that record of proceedings in prior appeal 2-482 A 105 referred to in paragraph 1 and subparagraphs 1.1 thru 1.4 thereof be made and considered part of record of proceedings in this appeal 1-685 A 146 and for all other proper relief.

Respectfully submitted,

HOLMES & KORDYS
310 Fourth Street
Covington, Indiana 47932
317-793-2266
Attorneys for Appellants

AFFIDAVIT

STATE OF INDIANA)
COUNTY OF FOUNTAIN)
) ss

RICHARD M. HOLMES—affiant—being first duly sworn on oath deposes and says that affiant is attorney at law admitted to practice in Indiana and is attorney for appellants; that affiant has read appellants' petition that record of proceedings in prior appeal be made and considered part of record of proceedings in this appeal and is familiar with contents thereof; and affiant states he verily believes that statements therein contained are true.

_____

Richard M. Holmes

SUBSCRIBED AND SWORN TO before me a notary public this — day of September 1985.

_____

notary public

My commission expires: _____

printed: _____

Residing at: _____

(Certificate of Service Omitted in Printing)

APPENDIX I

STATE of INDIANA
Clerk of the Supreme Court
and Court of Appeals
Marjorie H. O'Laughlin,
Clerk
217 State House

INDIANAPOLIS, 46204

Telephone 232-1930

No. 1-685 A 146

Matter of Guardianship of Pearl C. Posey, et al —v— Lafayette Bank and Trust Company, et al

You are hereby notified that the Court of Appeals has on this day Appellee's Motion to Dismiss DENIED. Buchanan, C.J.

Petition GRANTED. Clerk Directed to Transfer Record from cause number 2-482 A 105 to the Cause. Buchanan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 26th day of September, 1985

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

No. 87-1356

In The
Supreme Court of the United States
October Term, 1987

MATTER OF THE GUARDIANSHIP OF PEARL C. POSEY, ADULT INCOMPETENT, RAYMOND HARKRIDER, RAYMOND HARKRIDER AS EXECUTOR OF THE ESTATE OF GEORGIA CORY, DECEASED, BETTY ROGERS and JUNE NELSON,

Petitioners,

v.

LAFAYETTE BANK AND TRUST COMPANY, HANNA GERDE & MEADE, BALL EGGLESTON BUMBLEBURG & McBRIDE, FLOYD WILCOX, STUART & BRANIGIN, ANN G. DAVIS and VAUGHAN, VAUGHAN & LAYDEN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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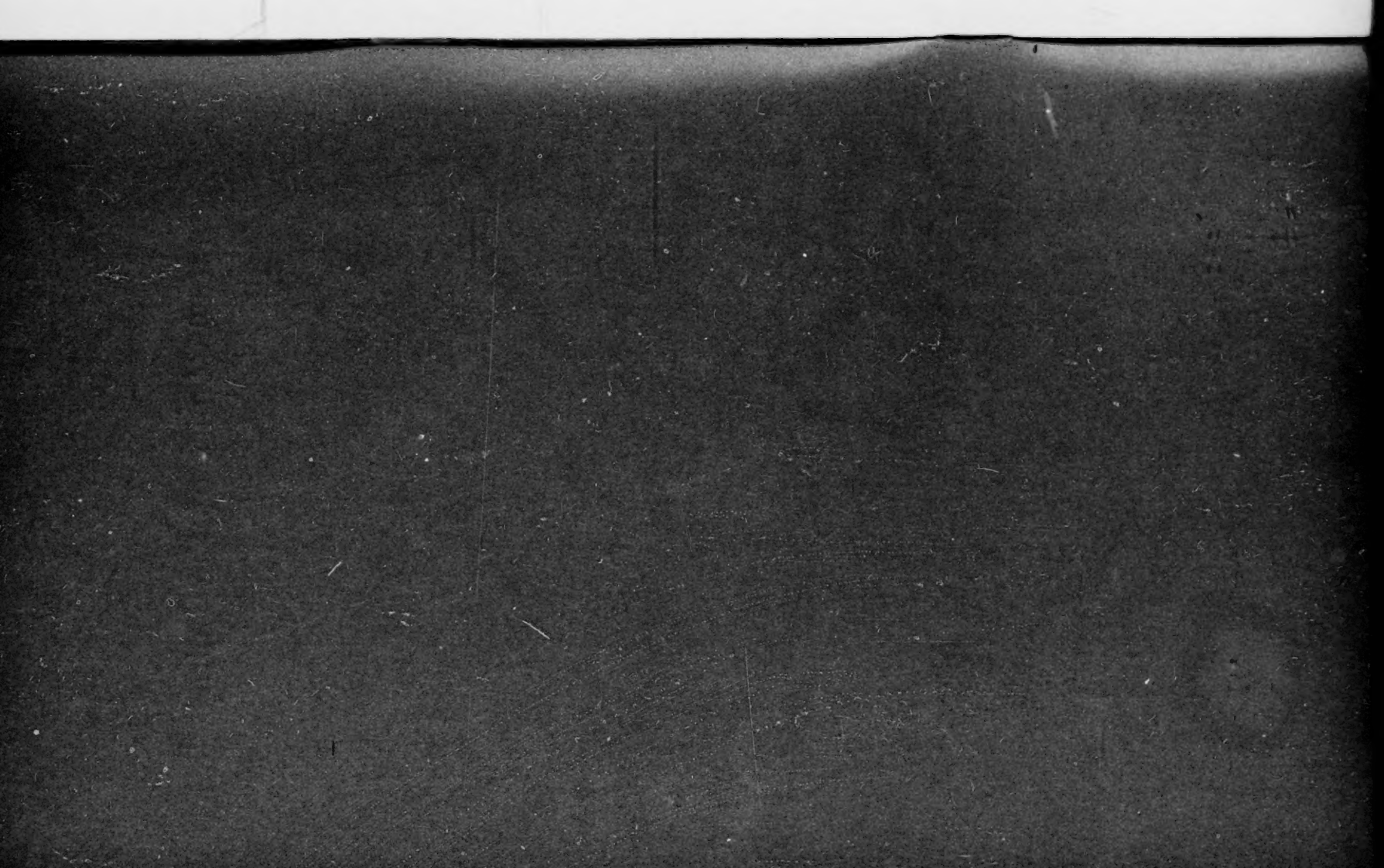

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TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS AND STATUTES

GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioners (hereafter referred to collectively as "Harkrider") seek to invoke this Court's jurisdiction under 28 U.S.C. § 101. That statute, however, does not provide any basis for jurisdiction, and therefore Harkrider has failed to properly assert any basis for jurisdiction for his petition.

———o———

STATEMENT OF THE CASE

Harkrider was sanctioned by the Indiana Court of Appeals and Supreme Court of Indiana for having brought an appeal which was not only frivolous, but was pursued in bad faith. The finding of Harkrider's bad faith was premised not only upon his violation of the rules of Indiana Appellate Procedure and abuse of the appellate process, but also on his misrepresentation of the record from the Court below. Harkrider's statement of the case here continues to make gross misstatements of fact and distortions of the record, thereby manifesting the bad faith in which even this appeal has been pursued.

The history of this long and tortured litigation began with the filing of a petition for appointment of guardian for Pearl Posey by Harkrider on June 30, 1981. (R. 9). On July 21, 1981, Floyd Wilcox (Wilcox) filed his cross petition for appointment of guardian. (R. 22). Although Harkrider contends in his statement of the case that this cross petition failed to conform to the requirements in I.C. 29-1-1-12, the only objection raised at the hearing on

July 21, 1981 to the cross petition was that it failed to give proper notice under I.C. 29-1-18-14. (R. 125). Thus, the objection which Harkrider attempts to raise now is different from the objection raised at trial.

The hearing on the appointment of a guardian was held on July 21 and 24, 1981. Evidence was presented on the manner in which the Posey farm was conveyed to Wilcox. Harkrider states at page 7 of his Petition that on November 9, 1977, Pearl Posey and Wilcox executed a document styled "Escrow Agreement" pursuant to which a deed to Pearl's eighty acre farm was placed in escrow to be transferred to Wilcox upon her death. This statement is the basis for the errors alleged in Harkrider's second question for review which asserts that the claim is "against a guardian who conveyed his ward's farm to himself. . . ." This is a gross misrepresentation of the record. Wilcox did not convey the Posey farm to himself nor did he execute any "Escrow Agreement" nor any other document causing it to be conveyed to him. The only documents pertaining to this transaction were a letter and deed prepared by an attorney and signed by Pearl Posey. (See R. 154, exhibit A included herein as Appendix A. The Appendix is being lodged with the Court under separate cover.) Mr. Bennett, the attorney who prepared the deed and suggested that the deed be placed in escrow until her death, testified that it was Mrs. Posey's idea to give the farm to Wilcox, and that this came as a surprise to Wilcox who went to Bennett's office expecting to purchase the farm on contract. (R. 219-221). Thus, there can be no justification for misrepresenting that Wilcox conveyed the property to himself when it is clearly apparent

from the record that the documents executed on November 9, 1977 were executed by Pearl Posey alone.

At the conclusion of the hearing on July 24, 1981, the Court entered an order appointing Lafayette Bank and Trust as guardian of Pearl Posey's estate. The Court was uncertain whether there was any need to have a guardian of the person appointed, and requested Ms. Davis, the Court appointed attorney for the ward, to investigate the matter and report back to the Court. (R. 382). Although Harkrider now objects that he was not given any notice of this report and had no opportunity to respond to it, he fails to note that he and his attorney were both present when the Court made this request of Ms. Davis and yet failed to raise any objection to this procedure. Ms. Davis reported that a guardian of the person was needed, a view shared by Harkrider, and the Court found that Wilcox should be appointed as guardian of the person instead of Mr. Harkrider.

Following the appointment of Lafayette Bank and Trust as guardian of the estate and Wilcox as guardian of the person, Harkrider took his first appeal to the Indiana Court of Appeals challenging this decision and virtually every other order entered by the Court which was adverse to him. The Court of Appeals affirmed the trial court in a memorandum decision filed on July 20, 1983. (Appendix B). The Court of Appeals denied Harkrider's claim that he was denied due process by not having notice or any opportunity to be heard on the question of the award of attorney's fees and other similar matters holding that such orders were not yet final appealable

orders, and that the time for raising any objection to such orders would be at the final accounting of the guardianship. The Court of Appeals further held that Harkrider did not have any property interest in the guardianship, and therefore was not entitled at that time to any notice. Furthermore, the Court of Appeals held that the trial court did not abuse its discretion under I.C. 29-1-18-17(d) by declining to give Harkrider notice of all matters affecting the guardianship. Harkrider then filed a Petition for Rehearing which was denied. He next sought transfer to the Indiana Supreme Court, but his petition was denied.

Pearl Posey died on March 19, 1982. Because the first appeal was still pending, the guardianship could not be closed and the guardianship assets could not be turned over to the ward's estate. It was therefore necessary for Wilcox as executor of the estate to petition the Court for funds to pay claims against the estate. Harkrider's characterization of all of these expenses being used to pay "fees" is a distortion of the record. On July 20, 1982 the Court directed a partial distribution be made to the estate in the sum of $5,000.00 to pay expenses of the estate such as the funeral and burial expenses of the ward. (Appendix C). The portion of this distribution which was not used to pay expenses is still a part of the estate. On March 11, 1983 the Court directed distribution be made to the estate in the sum of $19,939.57. This money was used to pay the Indiana inheritance tax for the estate. (Appendix D).

Harkrider's suggestion that he was denied due process by not being provided with notice and an opportunity for hearing on his objections to the attorneys' fees is also

incorrect. Although interim petitions for fees were still subject to review at the final accounting, Harkrider was even afforded an opportunity for a hearing on an Interim Petition for Attorneys' Fees which lasted two days due to the lengthy cross-examination of the guardian's attorneys by Harkrider. This hearing was held on April 9 and 12, 1984. (R. Vol. 4, pp. 968-1104). Although the trial court granted interim petitions for allowances of fees, these orders for allowances were not final until the hearing on the Final Accounting which was held on March 4, 1985. The attorneys for the guardians at that time presented evidence concerning their petitions for fees on which there had not yet been a hearing, the nature of services performed, the amount of time required to perform such services, and the standard hourly charges for such services. (R. Vol. 6). Mr. Harkrider and his attorney were both present during this hearing and cross-examined the guardian's attorneys at length regarding the amount of their fees. Thus, only after notice and a hearing in which Harkrider and his attorneys were present and were allowed to cross-examine the guardians' witnesses did the orders of the trial court become final.

After the trial court approved the final accounting on March 11, 1985, Harkrider then prosecuted his second appeal in this case. Harkrider claims he was never given any notice or opportunity to be heard on the issue of sanctions under A.R. 15(G). This is also untrue. In his appellee's brief, Wilcox raised the issue of whether Harkrider should be sanctioned under Indiana Rules of Appellate Procedure (A.R.) 15(G). That portion of Wilcox's brief which discussed the issue is included herein as Appendix E. Harkrider responded to this issue in his reply

brief, the pertinent portion of which is included herein as Appendix F. Harkrider did not file any motion with the Court of Appeals asking for a hearing on this issue.

On September 3, 1986 the Indiana Court of Appeals affirmed the trial court's approval of the guardian's final accounting. The Court of Appeals further held that Harkrider should be sanctioned pursuant to A.R. 15(G) for having undertaken and prosecuted the appeal which was not only frivolous but in bad faith. The Court of Appeals gave four reasons for its imposition of sanctions which were apparent from the record before it: 1) Numerous significant failures to observe the Indiana Rules of Appellate Procedure, 2) Absence of any mention of prior appeal, 3) Ignoring or omitting facts established in the record or misstatement of existing facts, and 4) Drafting his brief in a manner calculated to require the maximum expenditure of time by appellees and the Court.

Harkrider then filed a Petition for Rehearing in the Indiana Court of Appeals. (Harkrider's Appendix B). No error was asserted based upon any claim of denial of due process concerning the award of sanctions under A.R. 15(G). The Petition raised only one claim of constitutional error. In paragraphs 13(H) and 13(I) Harkrider asserted that his right to due process was violated as a result of unspecified ex parte rulings of the trial court and ex parte communications between appellee's counsel and the trial court. Other than the report to the Court by Ms. Davis, it is not clear to what rulings or communications Harkrider is referring. Harkrider's Petition for Rehearing cited to pp. 97-98 of his appellant's brief which referred to every order of the trial court since the litigation began,

including the order of the Court appointing Lafayette Bank and Trust as guardian of the estate, the order appointing Wilcox as guardian of the person, and the order approving the Final Accounting in the guardianship, all of which were conducted after a notice and opportunity to be heard in which Harkrider and his attorney appeared and were allowed to present their own testimony and other evidence.

Harkrider's Motion for Rehearing was overruled on October 14, 1986. He then filed his Petition to Transfer in the Supreme Court of Indiana. (Harkrider's Appendix D). Like the Petition for Rehearing in the Court of Appeals, no error was asserted based upon any claim of denial of due process by the imposition of sanctions under A.R. 15(G). Again, the only constitutional errors raised concerned alleged ex parte rulings and communications which were not specified with any particularity.

The Indiana Supreme Court granted Harkrider's Petition to Transfer and at the same time took up two other cases in which the question of sanctions under A.R. 15(G) was raised. The Indiana Supreme Court reversed the award of sanctions in the other two cases, *Orr v. Turco Manufacturing Co., Inc.*, 512 N.E.2d 151 (Ind. 1987); and *Lesher v. Baltimore Football Club,* 512 N.E.2d 156 (Ind. 1987), but affirmed the award against Harkrider finding "circumstances significantly more grave than mere lack of merit" and held that "gross abuse of the right to appellate review . . . should not go unrebuked." The Indiana Supreme Court remanded the cause to the trial court for an award of such attorneys' fees as may be determined to be appropriate. (Harkrider Appendix E). The Indiana

Supreme Court did not address any of the constitutional claims now raised by Harkrider.

Harkrider then filed his Petition for Rehearing in the Indiana Supreme Court. (Harkrider Appendix F). For the first time, Harkrider contended that the imposition of sanctions under A.R. 15(G) violated his constitutional right to due process. The Indiana Supreme Court denied Harkrider's Petition for Rehearing (Harkrider Appendix G) without addressing the constitutionality of the award of the sanctions under A.R. 15(G).

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ARGUMENT

THIS COURT LACKS JURISDICTION TO CONSIDER ANY ERROR CONCERNING CLAIMS OF DENIAL OF DUE PROCESS

The first error alleged by Harkrider is that the decisions of the Indiana Court of Appeals and the Indiana Supreme Court imposing sanctions pursuant to Indiana Rule of Appellate Procedure (A.R.) 15(G) violated his right to due process under the United States Constitution. Significantly, Harkrider failed to raise this issue before the Indiana Court of Appeals, and did not raise it in the Indiana Supreme Court until after that Court affirmed the decision of the Court of Appeals. By failing to properly present this issue to the Indiana Court of Appeals and the Supreme Court of Indiana, any error regarding the imposition of sanctions has been waived. The issue was not considered by the courts below and this Court therefore lacks jurisdiction to consider the issue.

The only claim of any denial of due process presented by Harkrider to the Indiana Supreme Court in his Petition to Transfer concerned certain alleged ex parte communications. By failing to make any objection to the Court's request to Ms. Davis that she make a report to the Court concerning the necessity of appointing a guardian of the person, Harkrider has waived any error concerning this procedure. By failing to present any cogent argument to the Indiana Court of Appeals concerning any other alleged ex parte communications, any error concerning such matters was also waived. Thus, the Indiana Supreme Court was not requested to address any constitutional claims which had not been waived. Accordingly, no constitutional claims of any alleged denial of due process were addressed by the Indiana Supreme Court.

Because the constitutional claims asserted by Harkrider in his Petition for a Writ of Certiorari were not properly raised before the Indiana Supreme Court and therefore were not addressed by that Court, there is no jurisdiction to grant Harkrider's Petition. This precise issue was recently considered by this Court in *Exxon Corporation v. Eagerton,* 462 U.S. 176, 103 S. Ct. 2296, 76 L. Ed. 2d 497, 504 (1983) in which the Court concluded that it had no jurisdiction to consider an issue which had not been decided by the Court below. Quoting *Street v. New York,* 394 U.S. 576, 582, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) the Court observed that the decision below did not discuss this issue, and when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." See

also *Fuller v. Oregon*, 417 U.S. 40, 50 n.11, 40 L. Ed. 2d 642, 94 S. Ct. 2116 (1974); *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981); and *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), reh. den., 463 U.S. 1237, 77 L. Ed. 2d 1453, 104 S. Ct. 33 (1983). Thus, the constitutional claims which are asserted here were not ruled upon by the Indiana Supreme Court because those claims had been waived. Therefore, this Court has no jurisdiction to consider these claims.

HARKRIDER'S CONTENTION THAT HE WAS DENIED DUE PROCESS BY THE INDIANA COURT OF APPEALS AND SUPREME COURT'S DECISIONS TO IMPOSE SANCTIONS AGAINST HIM IS SO PLAINLY WITHOUT MERIT TO BE FRIVOLOUS

Harkrider's contention that he was never provided with any notice or opportunity to be heard on the issue of the imposition of sanctions is simply untrue. Furthermore, his contention that he was denied due process by not being given an evidentiary hearing is contrary to all precedent in which such sanctions have been imposed based upon conduct similar to that demonstrated by Harkrider during this appeal, which conduct is evident from the face of the record.

Although it is certainly true that due process requires that some notice and opportunity to be heard be provided before sanctions may be imposed, Harkrider cannot contend in good faith that he was not provided with any notice or opportunity to be heard before the sanctions were

imposed. The issue of whether Harkrider should be subject to sanctions was raised by Wilcox in his appellee's brief which was filed in the Indiana Court of Appeals on March 26, 1986. (Appendix E). This issue having been raised in the appellee's brief, Harkrider was put on notice that the Court of Appeals would consider this issue, and, if the Court of Appeals found in the appellee's favor, sanctions could be imposed. Harkrider was not only given the opportunity to respond to this issue, in fact, he did respond to this issue in his reply brief filed with the Indiana Court of Appeals. (Appendix F). Hence, Harkrider had notice of this issue and the opportunity to respond to it before any sanctions were entered against him. Harkrider's assertion at page 14 of his Petition that prior to the imposition of sanctions by the Court of Appeals, "there was no opportunity to respond to the bases it ultimately used" is clearly a misstatement of the record.

Moreover, not only was Harkrider provided with notice and an opportunity to be heard before the Court of Appeals imposed sanctions against him, Harkrider was afforded numerous opportunities to be heard on this issue after the Court of Appeals made its decision. As noted by the court in *Braley v. Campbell,* 832 F.2d 1504 (10th Cir. 1987), a petition for rehearing generally would be adequate to provide a party with an opportunity to respond to bring any errors to the court's attention. Harkrider was provided with three opportunities to be heard on this issue by briefs after receiving the Court of Appeals' decision holding that sanctions should be imposed against him. Opportunities to be heard were provided through the Petition for Rehearing in the In-

diana Court of Appeals, the Petition to Transfer to the Indiana Supreme Court, and the Petition for Rehearing in the Indiana Supreme Court. Furthermore, the fact that these were meaningful opportunities is evidenced by the fact the Indiana Supreme Court also considered two other cases on the question of the propriety of attorney's fees under A.R. 15(G) together wth Harkrider's Petition to Transfer, and the Indiana Supreme Court reversed the award of attorney's fees in both of the other cases. The award against Harkrider was affirmed because it was evident from the record before the Court that Harkrider's misconduct was so abusive and so flagrant that it should not go unrebuked.

Harkrider's contention that there is a constitutional right to an evidentiary hearing before sanctions can be imposed against him is totally without merit. Indeed, the United States Supreme Court has itself awarded damages under its Rule 49.2 without a hearing where it was apparent from the record that circumstances justified such an award. *See, e.g., Hyde v. Van Wormer,* 474 U.S. 992, 88 L. Ed. 2d 355, 106 S. Ct. 403 (1985), and *Tatum v. Regents of University of Nebraska-Lincoln,* 462 U.S. 1117, 77 L. Ed. 2d 1346, 103 S. Ct. 3084 (1983). Obviously if the United States Supreme Court has imposed sanctions without an evidentiary hearing, it may not reasonably be argued that due process mandates such a hearing.

The only authorities cited by Harkrider are not supportive of his position. Harkrider has misstated the holding of the court in *Braley v. Campbell,* 832 F.2d 1504 (10th Cir. 1987). The court did not reverse the grant of sanctions against an attorney because he was not given

a de novo evidentiary hearing to argue the original panel's imposition of sanctions as Harkrider claims. To the contrary, the court held that due process does not require an evidentiary hearing. "At the appellate level, the right to respond does not require an adversarial evidentiary hearing. (Citations omitted.) Even at the trial court level, the sanction inquiry may properly be limited to the record in most instances. (Citation omitted.)" 832 F.2d at 1515. The court in *Braley* concluded that a hearing may be necessary only if factual issues arise from the response of the sanctioned party affecting either the amount or whether sanctions should be imposed at all.

Harkrider has also misconstrued the court's holding in *Textor v. Board of Regents of Northern Illinois University,* 711 F.2d 1387 (7th Cir. 1983). In *Textor,* the court held that the district court erred in imposing fees without a prior hearing where there was a factual issue under Rule 11 whether counsel's conduct was indicative of bad faith sufficient to support such sanctions, or merely of incompetence. The court did not suggest that a hearing would be mandated where there was no such factual dispute observing that, "truly egregious conduct by counsel may support a finding of willful abuse without any inquiry about counsel's intent. . . ." 711 F.2d at 1395.

Harkrider has likewise misconstrued the court's holding in *Rogers v. Lincoln Towing Service, Inc.,* 771 F.2d 194 (7th Cir. 1985). Harkrider cites the case for the proposition that due process mandates an evidentiary hearing before sanctions may be imposed. The court did not hold that such a hearing is mandated or even suggest that a hearing is necessary in all cases; in fact, the court affirmed

an award of sanctions which had been imposed without hearing. The district court had imposed sanctions under Rule 11 without a hearing finding,

> "A hearing would serve no meaningful purpose since I imposed the sanction based on my conclusion that a majority of the claims made in the amended complaint were unreasonable as a matter of law. . . . There is no possible justification under an objective standard for loading down a complaint with worthless claims such as these, which are totally unsupported by even a single allegation of the complaint. The advisory committee's notes clearly contemplate that in some instances a district court will know enough about a particular pleading, without conducting a hearing, to decide it violates rule 11. . . . Due process does not demand a hearing to develop facts where the ruling is one of law and the facts adduced at the hearing would not alter the legal conclusion." 596 F. Supp., 13 at 27-28

The Court of Appeals affirmed holding, "we agree with the district court that the complaint was overblown and that a hearing would have served no useful purpose." 771 F.2d at 205.

This case is representative of how the drafters of Rule 11 intended for the rule to be applied in situations where the relevant facts are already of record, and due process does not require any further hearing. The Advisory Committee Comments indicate that although sanctions may not be imposed without due process, "In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary." 97 F.R.D. 165, 201.

The Court of Appeals for the Seventh Circuit in *Hill v. Norfolk and Western Railway Company*, 814 F.2d 1192

(7th Cir. 1987) recently imposed sanctions sua sponte under Rule 38 of the Federal Rules of Appellate Procedure (which is the counterpart of Indiana Rule 15(G)). Consistent with its prior holding in *Textor,* the court held that due process does not mandate a hearing where the basis for the sanction appears from the record itself.

> But obviously the right to a hearing . . . is limited to cases where a hearing would assist the court in its decision. (Citations omitted.) Where, as in this and most Rule 38 cases, the conduct that is sought to be sanctioned consists of making objectively groundless legal arguments and briefs filed in this court, there are no issues that a hearing could illuminate. All the relevant "conduct" is laid out in the briefs themselves; neither the mental state of the attorney nor any factual issue is pertinent to the imposition of sanctions for such conduct. Where a hearing would be pointless it is not required, (citation omitted); hence "if there are no contested factual issues the district court can proceed summarily," (citation omitted), as we are doing here. . . . The text of Rule 38, and our previous decisions applying it, provide all the notice an attorney could reasonably demand that sanctions may be imposed on counsel directly for the making of frivolous legal arguments in this court—and imposed without a hearing, if there are no factual questions. . . . A hearing is required in a proceeding concerning sanctions only if there is a contested factual issue; there is not and cannot be one in this case.

814 F.2d at 1201-1203.

In *Szabo Ford Service, Inc. v. Canteen Corp.,* 823 F.2d 1073, 1082 (7th Cir. 1987) the Court held the District Court had erred in not awarding attorneys' fees as sanctions under Rule 11 observing, "The violation being established on the legal record, a hearing is unnecessary." The

most recent decision on point in the Seventh Circuit also imposed sanctions without prior notice of a hearing pursuant to Fed. R. App. P. 38 for the same misconduct as Harkrider which included filing briefs replete with misrepresentations. See *Fox Valley AMC/Jeep, Inc. v. AM Credit Corp.*, 836 F.2d 366 (7th Cir. 1987). It is therefore plainly frivolous for Harkrider to rely upon cases from the Seventh Circuit in support of his contention that A.R. 15(G) is unconstitutional for not mandating a hearing before sanctions may be imposed when the Seventh Circuit has held on numerous occasions that due process does not require any hearing and has itself imposed sanctions for a frivolous appeal without notice or hearing for the same form of misconduct which has been demonstrated by Harkrider.

It is apparent from the decisions of the Indiana Court of Appeals and the Indiana Supreme Court that all of the relevant misconduct which formed the basis for the conclusion that Harkrider's appeal was in bad faith was contained in Harkrider's own briefs, and there were no additional factual issues pertinent to the imposition of sanctions for such misconduct. Harkrider's bad faith was found from 1) the disregard of the form and conduct requirements of Indiana Rules of Appellate Procedure 8.2 (A)(1), 8.3(A)(4), 8.3(A)(5), and 8.3(A)(7); 2) his omission and misstatement of the facts established in the record; 3) the brief was written in a manner calculated to require the maximum expenditure of time by both appellees and the court; and 4) the failure to disclose properly his previous appeal raising many of the same issues and attempt to relitigate many of these same issues even

though they had been decided adversely to him in the prior appeal.

Harkrider does not assert in his Petition that there was any error regarding the first three of these grounds for imposition of sanctions, but contends that the Supreme Court's finding that his failure to disclose his previous appeal was "blatantly erroneous." This argument distorts the basis for the Court's finding. The Indiana Rule of Appellate Procedure 8.3(A)(4) requires that the appellant's brief contain a statement of the case. The statement of the case contained in Harkrider's appellant's brief totally failed to mention the fact that there had been a prior appeal in this case which he lost. Although the Court of Appeals could have discovered that the prior appeal had been undertaken from Harkrider's motion to include the prior appeal in the record of the second appeal, it was Harkrider's own failure to bring properly the fact the appeal had been taken to the court's attention and the manner in which he totally ignored the prior decision of the Court of Appeals which led to the finding that he had failed to disclose his previous appeal. Harkrider's attempt to raise and argue many issues which had been decided against him on the prior appeal as though they had never before been decided was clearly inexcusable and demonstrated bad faith.

Not only has Harkrider misstated or misconstrued the holdings of the cases cited in his Petition as well as distorted the facts in the record, he has also ignored those cases which have held that there is no constitutional right to a hearing on whether sanctions should be opposed or what level of sanctions should apply. In *Toepfer v. De-*

partment of Transportation, FAA, 792 F.2d 1102 (D.C. Cir. 1986) the court imposed sanctions under Fed. R. App. P. 38 without a hearing holding, "To require a hearing for the assessment of such damages and costs would impose on the opposing party and on the court an even greater burden in dealing with a frivolous appeal and entirely defeat the purpose of Rule 38." 792 F.2d at 1103. *See also, McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir. 1986); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1082 (7th Cir. 1987); and *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984), cert. den. 469 U.S. 1189, 83 L. Ed. 2d 965, 105 S. Ct. 959 (1985). Sanctions have been imposed without a hearing in numerous other cases in which certiorari has been denied. *See, e.g., Hilgeford v. Peoples Bank*, 776 F.2d 176 (7th Cir. 1985), cert. den., 475 U.S. 1123, 90 L. Ed. 2d 188, 106 S. Ct. 1644 (1985); *Trecker v. Scag*, 747 F.2d 1176, 1179 (7th Cir. 1984), cert. den., 471 U.S. 1066, 85 L. Ed. 2d 498, 105 S. Ct. 2140 (1985); *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 517 (2nd Cir. 1985), cert. den., 474 U.S. 1032, 88 L. Ed. 2d 573, 106 S. Ct. 593 (1985); *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir. 1984), cert. den., 469 U.S. 1018, 83 L. Ed. 2d 359, 105 S. Ct. 433 (1984); *United States v. Carley*, 783 F.2d 341 (2nd Cir. 1985), cert. den., — U.S. —, 90 L. Ed. 2d 697, 106 S. Ct. 2251 (1986); and *George v. State of Texas*, 788 F.2d 1099 (5th Cir. 1986), cert. den., — U.S. —, 93 L. Ed. 2d 153, 107 S. Ct. 226 (1987).

It is clear from these authorities that due process does not require an evidentiary hearing before sanctions may be imposed where the grounds for the imposition of such

sanctions are apparent from the record itself. In the present case, bad faith was evident from Harkrider's own briefs which misstated the facts, failed to give an honest statement of the case, abusively failed to comply with the rules of Appellate Procedure, and were done in such a manner as to oppress and harrass the appellees by requiring the maximum expenditure of time by both appellees and the Court. A hearing under such circumstances would serve no meaningful purpose. Likewise, the Petition for Writ of Certiorari misstates the facts, distorts the basis for the decisions of the Indiana Court of Appeals and the Supreme Court, and either misstates, misconstrues, or ignores the judicial decisions on this issue. Like the prior appeals, this appeal is frivolous and constitutes a glaring example of abuse of the judicial process.

HARKRIDER WAS GIVEN DUE PROCESS IN THE CONDUCT OF THE PROCEEDINGS

Assuming arguendo that this Court has jurisdiction to consider Harkrider's claims of denial of due process in the conduct of the proceedings in the trial court, it is clear that no denial of any right of due process occurred. Harkrider's statement of the question presented for review is so general and vague as to be incomprehensible. Rather than addressing any specific incident or order, the question broadly asserts that the entire conduct of proceedings operated to deny him due process. Such an assertion is patently absurd.

Harkrider had notice and an opportunity to be heard on the matter of the selection of a guardian. He exercised his right to appeal the Court's order appointing

persons to serve as guardians who were not favored by Harkrider as well as virtually every other order against him. After losing in the Court of Appeals he sought review by the Indiana Supreme Court which was denied. The case then returned to the trial court where Harkrider continued to contest virtually every petition by the guardians and efforts to administer the guardianship. There was a hearing which took two days to conclude on an Interim Petition for Attorneys' Fees at which time Harkrider was present and was allowed to cross-examine the guardian's attorneys on their fees. Any interim orders of the Court which were entered ex parte remained interlocutory until the hearing on the final accounting. Harkrider filed an objection to the final accounting. A hearing was conducted on his objections at which time Mr. Harkrider and his counsel were present and were allowed to present their own evidence and cross-examine the witnesses called by the guardians. Harkrider again exercised his right to appeal from the order approving the final accounting over his objection in which he raised over fifty grounds for error. His appeal was heard by both the Indiana Court of Appeals and the Supreme Court of Indiana. To argue that Harkrider was not given due process after having dragged this litigation through the Indiana courts for the past seven years during which there have been several hundred pleadings, motions and memoranda filed in the trial courts, numerous hearings, and two appeals completely through the Indiana Court of Appeals and the Indiana Supreme Court is plain nonsense.

To the extent that specific arguments have been made, they are plainly without merit. Harkrider persists in

arguing that I.C. 29-1-18-17 entitled him to notice. The argument continues to ignore the holding of the Court of Appeals from the first appeal, as the Court specifically found that Harkrider was not entitled to notice under I.C. 29-1-18-17. Furthermore, even if Harkrider was entitled to notice, no orders became final without notice and a hearing provided to Harkrider.

Harkrider's contention that the Court ignored the statutory order of preferences in the selection of guardians under I.C. 29-1-18-10 is also false. The Court did not ignore Mr. Harkrider's desire to be appointed as guardian. To the contrary, the Court specifically found that Mr. Harkrider was not suitable to be appointed because of ill feelings between the ward and Mr. Harkrider. (R. 380.)

Harkrider's claim that the trial court ignored the notice provision in I.C. 29-1-18-11(e) is likewise without merit. That statute merely requires that the petition for appointment of a guardian identify the person whose appointment is sought. Wilcox's petition did exactly that by requesting that Wilcox and a corporate fiduciary besides Purdue National Bank be appointed guardian. Moreover, the statute does not require that the court appoint any of the persons requested for appointment in any of the petitions.

Harkrider's claim that insufficient notice of the hearing was given under I.C. 29-1-1-12 is also specious. The hearing on the selection of a guardian was held on July 24 which was more than ten days after Harkrider's petition was filed. The statute does not require a continuance of the hearing for an additional ten days if a notice of objections to the original petition or a cross petition is

filed. It is further provided in I.C. 29-1-18-14 that the notice period may be reduced to as little as three days. Harkrider had notice of Wilcox's petition three days before the hearing, but did not request a continuance of the hearing or raise any objection for insufficiency of notice under I.C. 29-1-1-12. Moreover, Harkrider did not make any objection at the hearing based on improper notice under I.C. 29-1-1-12.

Harkrider incorrectly asserts that the Court appointed Wilcox despite previously stating that he was incompetent to serve. The record clearly shows the Court's statement was addressed only to Wilcox's proposed appointment as guardian of the estate; the Court did not suggest that Wilcox was incompetent to serve as guardian of the person. Thus, here again, Harkrider's assertion is a gross distortion of the record. Harkrider quotes only a portion of the Court's remarks and omits that portion of the text in which the Court found that the ward and Mr. Wilcox had enjoyed a good personal relationship for many years and that the ward had "expressed great confidence" in Mr. Wilcox and "presumably would like for him to continue to handle her affairs." (R. 380. Appendix G.) Thus, when placed in context, it is apparent that the trial court believed that Mr. Wilcox was competent to serve as guardian of the person. Harkrider's assertion that the trial court made a finding that Wilcox was incompetent to serve as guardian in any capacity is a complete fabrication.

These perceived errors were argued by Harkrider in his first appeal to the Indiana Court of Appeals which was decided against him. He then sought review of these errors to the Indiana Supreme Court, but his Petition for Transfer was denied. If there had been any errors of a

constitutional magnitude in the selection of Mr. Wilcox to act as guardian of the person, Harkrider should have sought certiorari on those issues after the Indiana Supreme Court had denied his Petition to Transfer, but he did not. Harkrider's attempt to relitigate these same issues again years later in the second appeal is but further evidence of the frivolous nature of this appeal and abuse of the judicial process.

HARKRIDER SHOULD BE SUBJECT TO FURTHER SANCTIONS

Since successfully defending the award of sanctions by the Indiana Court of Appeals in the Indiana Supreme Court, Wilcox has now had to incur additional attorneys' fees and expenses in opposing Harkrider's Petition for Writ of Certiorari. Given the circumstances of this appeal, it is only appropriate and just that the case be remanded to the Indiana courts for an award of such additional fees and expenses as may have been incurred in defending this Petition pursuant to Supreme Court Rule 49.2. This Petition for Writ of Certiorari, like the proceedings from which it was taken, is frivolous and vexatious. It has succeeded only in delaying the payment of the attorneys' fees and expenses previously awarded and in forcing Wilcox to defend one more insubstantial appeal.

This precise issue was considered by the court in *United States v. Nesglo, Inc.*, 744 F.2d 887, 892 (1st Cir. 1984). That case also involved a frivolous appeal from an award of sanctions from having prosecuted proceedings which were frivolous and vexatious. Observing that the "frivolous appeal of a sanction for bringing frivolous

litigation borders on abuse of process," the court ordered the appellants' attorney to pay the costs for attorneys' fees on the appeal under 28 U.S.C. § 1927, and further ordered that the appellants would be assessed double costs under Fed. R. App. P. 38. See also *Good Hope Refineries, Inc. v. R.D. Brashear,* 588 F.2d 846, 848 (1st Cir. 1978).

A similar result was reached by the court in *In re Peoro,* 793 F.2d 1048 (9th Cir. 1986). The district court assessed attorneys' fees and affirmed a bankruptcy court order, doing so under 28 U.S.C. § 1927, due to the vexatious multiplication of the proceedings. Affirming the award, the Court of Appeals observed that the facts of the case presented a textbook example of the use of litigation to bludgeon opponents into submission. The court further ordered that the appellant would be liable for the appellee's reasonable attorneys' fees incurred in having to defend the appeal under F. R. App. P. 38 holding, "[W]e think it appropriate to assess double costs and attorneys' fees against Eisenman for this appeal. He has presented only frivolous arguments. We view this appeal as just another stage in his long abuse of the federal judicial system." 793 F.2d at 1052.

A similar result was reached by the court in *Westmoreland v. CBS, Inc.,* 770 F.2d 1168 (D.C. Cir. 1985). The Court of Appeals held that the district court had erred in not awarding sanctions under Rule 11. The court further held that the appellant would be entitled to his attorneys' fees on appeal. Discussing the policy for its decision, the court observed that it is very possible that appellate expenses and fees might substantially exceed the sanctions in the court below, thus forcing many liti-

gants to conclude that vindication is not worth the effort. Given the purpose of Rule 11 to deter groundless litigation, litigants who succeed on appeal in enforcing such sanctions should not then have to bear the costs of such an appeal.

It is all too evident from Harkrider's brief which misstates both the facts and the law that this further effort at appeal is likewise frivolous and in bad faith. Like the *Peoro* case, this appeal is just another stage in the long abuse of the judicial system. The Indiana Supreme Court concluded that such abuse should not go unrebuked. If Harkrider is to be deterred from continuing to pursue this litigation in bad faith, Harkrider should be required to bear the additional fees and expenses incurred by Wilcox in having to defend yet another frivolous appeal.

CONCLUSION

For the reasons discussed, Wilcox would respectfully request this Court to dismiss this Petition for Writ of Certiorari for lack of jurisdiction or in the alternative, to deny this writ. Wilcox would further respectfully request this Court to order that additional sanctions be imposed against Harkrider pursuant to Rule 49.2 of the Rules of the United States Supreme Court in an amount to be determined by the Indiana courts below, and such other sanctions as this Court may deem appropriate.

Respectfully submitted,

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